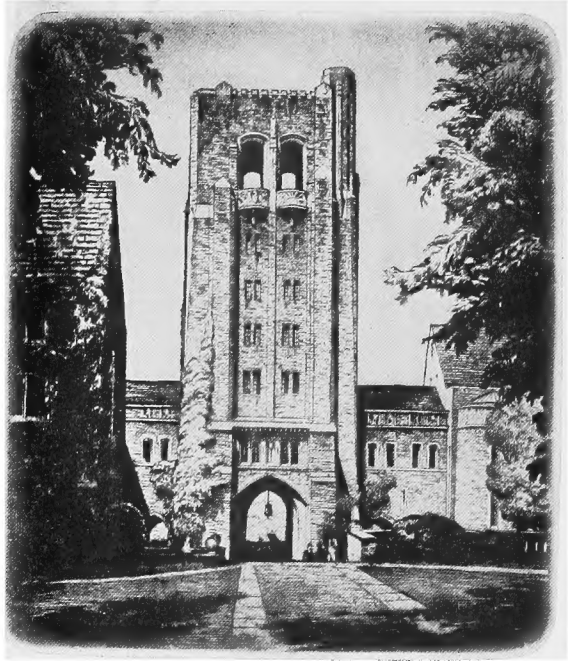




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NOTES ON  
THE CANADIAN LAW  
OF  
LANDLORD AND TENANT  
AS APPLIED TO  
CORPOREAL HEREDITAMENTS

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BY  
*enneth*  
ESTEN K. WILLIAMS  
OF OSGOODE HALL (BARRISTER AT LAW)

AND OF THE BAR OF THE PROVINCE OF MANITOBA

Author of The Manitoba King's Bench Act, Annotated. Editor of The Western Law Reporter, 1915 to 1917. Editor of The Digest of Canadian Case Law. One of the Lecturers to the Manitoba Law School.

---

WITH AN INDEX BY  
J. M. DeC. O'GRADY  
OF THE MANITOBA BAR  
AND A TABLE OF CASES BY  
R. M. FISHER  
ALSO OF THE MANITOBA BAR

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To  
HIS HONOUR  
SIR JAMES AIKINS, K.C., LL.D.,  
Founder and  
First President of  
THE CANADIAN BAR ASSOCIATION,

These notes, which indicate in part the desirability of such uniformity of legislation by the "common law" Provinces of Canada as it has been the aim of the Founder and of the Association to bring about, are with his permission respectfully dedicated.





## PREFACE

---

This work does not purport to be a treatise on the law relating to landlord and tenant, nor is it an attempt at a codification of that law.

An attempt has been made to state the general principles of the law in a convenient form and to give the authorities, from which such principles appear, in the following text.

The writer was allowed to make the very full use which he has made of the late Mr. S. R. Clarke's "Landlord and Tenant." The excellence of that work is too well known to the Canadian Bar for it to be necessary to dwell upon it.

No attempt has been made to deal with the law of the Province of Quebec, an omission which the writer to his regret was forced to make but which he hopes some time to remedy. The law of the "common law" provinces is alone dealt with.

The requirements of solicitors practising in places where libraries are poor or non-existent have been kept in mind in the preparation of these notes. It is for this reason that full reports of the facts of most of the cases cited are given and that extensive quotations are made from many judgments. It is believed that the advantages of this will far more than compensate for the increased size of the book.

The desirability of having some work which will enable the student-at-law to acquire general principles as readily as possible was the primary cause of adopting the method employed in treating of the subject.

The Short Forms Acts are dealt with separately in Appendix "A."

Article 131, dealing with assignment and devolution by operation of law, is the work of Mr. H. W. H. Knott, of the Middle Temple, Barrister-at-Law, and of the Manitoba Bar, who also contributed Articles 142 and 143—"Covenants running with the land" and "Covenants running with the reversion."

It is believed that all of the law—both case law and statute law—down to the end of 1920, is here available to the profession.

The Index and Table of Cases were prepared by Mr. J. M. deC. O'Grady and Mr. R. M. Fisher, respectively, both of the Manitoba Bar.

Since the above was written a strike of printers delayed publication nearly one year and an addenda—Appendix C.—has been added which gives references to the case law reported during the period from January 1st, 1921, to the date of publication.

E. K. WILLIAMS.

Winnipeg, Manitoba,

1st May, 1922.

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# LANDLORD AND TENANT

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## CHAPTER I.

### THE CREATION OF THE RELATIONSHIP.

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It is contractual.

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Possession—*Interesse Terminii*.

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### THE RELATION DEFINED.

ARTICLE 1.—The relation of landlord and tenant is a contractual one, arising when one party [retaining in himself a reversion] permits another to have

the exclusive possession of a corporeal hereditament for some definite period or for a period which can be made definite by either party.

[Authorities: *Infra: Passim.*]

Rent need not necessarily be reserved: 18 Hals. s. 766, note (a).

*“The relation is a contractual one.”*

In a brief note at p. 217 and in an article at p. 245 of 15 C. L. T. (1895), Mr. E. D. Armour, K.C., discusses the question as to whether the relation is a matter of contract or is a status. The matter came up for his consideration on the passing of the then new Landlord and Tenant Act: 58 Vic. c. 26 (Ont.), referred to immediately below. See also 18 Hals. s. 767.

*“One party.”*

Who may be a landlord?

*“Another.”*

Who may be a tenant?

See Article 3.

*“Retaining in himself a Reversion.”*

“The reversion is the undisposed of interest in land which reverts to the grantor after the exhaustion of the particular estate”: Stroud, p. 1755.

If the party conveys his whole interest in the premises it is an assignment and not a lease and—apart from statute or express agreement—if this is done there can be no distress for the rent reserved—only an action to recover it: *O'Connor v. Peltier* (1908) 18 M. R. 91, 8 W. L. R. 576 [Macdonald, J.]

*The Peculiar Ontario Provision.*

In 1860 the Imperial Parliament passed the Landlord and Tenant Law Amendment Act (Ireland), 23 & 24 Vic.

ch. 144. This Act was applied only to Ireland, and in 1895 the Ontario Legislature copied into the Ontario Act 58 Vic. 26, as s. 4, one of its provisions, namely:—

“The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent. And nothing in this Act shall affect any pending litigation.”

Mr. E. D. Armour, K.C., then editor of the Canadian Law Times, referred to this in (1895) 15 C. L. T. at p. 217, and later, in an article at pp. 245 *et seq.*, considered the effect of the change. His argument is briefly summarized by Meredith, C.J.C.P.—as he then was—in *Harpelle v. Carroll* (1895) 16 Occ. N. 118, 27 O. R. 240 at p. 245, as follows:—

“The relation of landlord and tenant was, before the passing of the Act, feudal in its nature, and rested upon the fact that the tenant held the land of or from his landlord; the right of distress is incident to the reversion, and no tenure now exists between the parties as between the reversioner and tenant, but the relation of landlord and tenant is one simply of contract, the right of distress, therefore, falls with that to which it was incident—the reversion, and the right to distrain must arise, if at all, from the terms of the contract.”

And see Armour on Real Property, pp. 135, 333 and 344.

In *Harpelle v. Carroll* (*supra*), however, Meredith, C.J., refused to give effect to this view, saying, at p. 248, after a careful consideration of the history of the Act and the Irish authorities:—

“It would seem to follow, therefore, that the relation of landlord and tenant, properly so called, was not created unless the lessor retained to himself the reversion, but that it was created whenever the rent was reserved by a lessor having the reversion; and the result of this would appear to be, that whenever the relation of land-

lord and tenant was created, it drew with it the right to distrain for the rent reserved by the lessor; and, as put in Woodfall on Landlord and Tenant, 15th ed. 440, 'distress is incident of common right to every *rent service*, properly so called, and the rent due from a tenant to a landlord is properly called a 'rent service,' though this description of it has long passed out of common use.'

"Now, the section in question does not abolish the relation of landlord and tenant and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well known relation; it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it was after the Statute Quia Emptores, but it is to be deemed to be founded on a contract express or implied. It would always, I take it, be necessary that in a certain sense the relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he, under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter, the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another 'in consideration of any rent.' "

In fact, where the new Saskatchewan Landlord and Tenant Act passed in 1919 [cap. 79] was practically a copy of the Ontario Act, section 3 was omitted.

The effect of the decision in *Harpelle v. Carroll* and the amendment to section 3 [4] was discussed at length by Mr. Armour in (1897) 17 C. L. T. at pp. 253 *et seq.*

The section passed through 59 V. c. 42, s. 3, into R. S. O. 1897, c. 170, s. 3, in practically its present form. It appeared in 1 Geo. V. c. 37, s. 3, and now is R. S. O. 1914, c. 155, s. 3, and reads:



“The relation of landlord and tenant shall not depend on tenure, and a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall it be necessary in order to give a landlord the right of distress that there shall be an agreement for that purpose between the parties.”

The changes in the section, particularly the addition of the last clause, were undoubtedly the result of the judgment of Meredith, C.J. *Harpelle v. Carroll* is the only reported case where the section has been judicially considered and the section has not been enacted in any other province.

There is also an article dealing with section 4 in (1895) 31 Canada Law Journal at p. 524.

“*Permits Another to have Possession.*”

*Reversionary Lease — Interesse Termini.*—“Until the lessee or termor, as he is sometimes called, enters into possession he has no estate, but only an anomalous right called an *interesse termini*. This interest is grantable to another, and, therefore, is a right of a higher degree than a right of entry for a condition broken, for this last is a mere possibility, and incapable of assignment. Also the right is capable of being infringed. Thus in *Gillard v. Cheshire Lines Committee* (1884) 32 W. R. 943, a lease of a building to commence in future was granted to the plaintiff. Before the term commenced the defendants, by excavating adjoining land, let down the building, which was thereupon closed by order of the local authorities, so that the lessee never acquired possession; it was held, that he had a good cause of action for the injury done to his *interesse termini*. The interest conferred by an *interesse termini* is a vested one, and the only difference between an immediate and reversionary lease is that the right of entry in the latter case is deferred. The right is vested in interest, though not vested in possession.” (1909) 29 C. L. T. 763-4. And see *Article 20: Lewis v. Baker* [1905] 1 Ch. 46; 74 L. J. Ch. 39; *Lord Llangattock v. Watney* [1910] 1 K. B. 236.

In the same article (p. 763), it is said: "it is doubtful whether such a lease is valid unless it is so limited as to take effect within the period allowed by the rule against perpetuities."

In *Mann, Crossman and Paulin v. Registrar of Land Registry* [1918] 1 Ch. 203, Neville, J., held that a lease *in futuro*, not to come into effect until after the expiration of twenty-one years is good, on the ground that it confers on the lessee, not an executory, but an immediate vested interest, a right *in rem* capable of alienation and which passes to the executor. He held that such a lease is a vested interest which does not come within the mischief of the rule, and he approved of *Redington v. Broune* (1893) 32 L. R. Ir. 347, per Bewley, J., at pp. 355-6.

Permission to a purchaser to take possession under an agreement for sale of lands, until default is made, creates a tenancy: when default is made the tenancy becomes a tenancy at will: *Green v. Longhi* (1914) 7 W. W. R. 924 (Alta.).

And see *Ackerman v. Boyd* (1899) 19 Occ. N. 403 [N.B.—Sup. Ct.] to the same effect, also *C. P. R. v. Fuller* [1917] 3 W. W. R. 90; 36 D. L. R. 404 [Alta.—C. P. R.] and Article 25.

The plaintiff's predecessor in title had sold to P. under an agreement for sale, which provided that no assignment of the agreement should be made without the vendor's consent. The plaintiff obtained a final order of foreclosure against P. and the order directed P. and all persons claiming under him to deliver up possession within 20 days. Prior to this P. had assigned his agreement to the defendants, but had not obtained the vendor's consent. S. removed the crop during the twenty days. Elwood, J., said, p. 763: "The order limiting 20 days for delivery of possession would create no tenancy, but would merely entitle occupancy for that period, and it would merely, in my opinion, give P. or any person claiming under him, who had goods upon the land, the right to enter for the purpose of removing the same therefrom." "In *Markey v. Coote* (1876) Ir. R. 10 C. L. p. 149, it was held that 'where a purchaser has entered into pos-

session of land under a contract of sale which is subsequently rescinded and remains in possession after the rescission, he is liable in respect of his subsequent occupation,' and at p. 156 . . . 'I am of opinion that the estate at will was determined by the rescission of the contract, and that the defendant is liable in trespass for the subsequent occupation. . . . The estate ceases on the determination of the will.' " *Stewart Bros. Farm Land Co. v. Schrader et al.* (1915) 8 W. W. R. 761; 8 Sask. L. R. 172 [Elwood, J.].

As to obtaining possession, see Article 19 and notes, pp. 172, *et seq.*

### *Attornment.*

"When a person is already in occupation of property and it is desired to establish the relation of landlord and tenant between another person and himself, this may be done by attornment," 18 Hals. s. 768.

As to Attornments in Mortgages, see Articles 30 to 32 (*post*) pp. 226, *et seq.*, and on Assignments, pp. 1028, *et seq.*

*"The Exclusive Possession."*

See Article 2.

*"Of a Corporeal Hereditament."*

The consideration of the subject of Landlord and Tenant in these notes is confined to its application to corporeal hereditaments. These "consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of Land only." Stroud, p. 411 [2nd Ed.].

When incorporeal hereditaments are appurtenant to corporeal hereditaments, they will pass under a demise sufficient as to the latter: *Skull v. Glenister* (1864) 16 C. B. N. S. 81; 32 L. J. C. P. 185; *Dobbyn v. Somers* (1860) 13 Ir. C. L. R. N. S. 293. See also p. 131, *post*.

*"For some definite period or for a period which can be made definite by either party."*

As to estates and interests in land see—generally p. 61, *post*.

Leasehold tenancies for a definite period are those for a “term of years”: for example, for five years certain.

“In order to have a term of years it is not necessary to have a year, nor, I think, any part of a year, mentioned. Littleton, in speaking of a tenant for years, says: ‘Tenant for terme of yeares is where a man letteth (*lou home lessa*) lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee’: Co. Litt., book 1, 43. b. But, in discussing the rights and duties of a tenant for years, he includes the case of a lease for half a year, or a quarter of a year, etc.; and I think, so long as the term is certain, it is what is technically called a ‘term of years,’ *per* Riddell, J., in *Re Lyons v. McVeity* (1919) 46 O. L. R. 148 [App. Div.] 17 O. W. N. 56, where a term of 14 months was held to be a term of years.

As to “Term of years,” see Article 22.

Leasehold tenancies which, though originally indefinite, can be made definite by either party are:

Tenancies at Will—as to which see Article 25.

Periodic Tenancies: as from week to week, month to month, quarter to quarter, and year to year, as to which see Articles 23 and 24.

Tenancies at Sufferance: as to which see Article 26.

In *Great Northern Railway Co. v. Arnold* (1916) 33 T. L. R. 114, Rowlatt, J., said at p. 115: “Authorities had been cited to show that a lease for years must be for a number of years certain, or for a time which was certain or could be rendered certain. The law was not modern: it was contained in Bacon’s Abridgment, Vol. 4, p. 836. . . .”

In this case the plaintiffs agreed to let certain premises to the defendant “for the period of the war, the rent payable weekly,” and said they did not intend that he should be subject to a week’s notice. They later brought an action for possession. Rowlatt, J., said he “thought

the law was ingenious enough to get around the difficulty. If a lease for 999 years had been made, terminable with the conclusion of the war, it would have been perfectly good as a tenancy. On the correspondence there was the clearest possible intention of both sides that it would be unreasonable that the agreement should terminate in a week and that that should be carried out by the agreement. By hook or by crook the defendant should have what he bargained for, and he (his Lordship) should treat the matter on that footing and give judgment for the defendant. He would not formally rectify the agreement."

In *Trust and Loan Co. v. Lawrason* (1882) 10 S. C. R. 679 (Ont. App.), Strong, J., said, p. 706: "Therefore, for the reason that it wants that prefixed certainty which is essential to the creation of a term, I should be inclined to hold—if the point had to be decided—that the quiet possession clause in the present case does not create a legal tenancy. . . . The mortgage deed in the present case does contain the affirmative covenant that the mortgagor shall hold, but not that he shall hold for a determinate time. It is no answer to this to say '*id certum est quod certum reddi potest*' for no principle of the law of property is better established than that which makes it indispensable to the creation of a term that its duration should be prefixed and certain from the beginning and not fluctuating or uncertain according as certain contingencies may or may not happen."

As both Rowlatt, J., and Strong, J., suggest, the best way of making a lease for an optional number of years is to grant for the longest term, giving to the lessor or lessee, or both, as may be agreed on, the right to determine the term on certain notice or by some other act at either of the shorter periods: And see *Higgins v. Longford* (1871) 21 U. C. C. P. 254 [Full Ct.].

Termination of the Term: see chapter XIII., p. 658, *post*.

## LICENSES.

ARTICLE 2.—Where the substance of the agreement between the parties is that the grantee is not

to have the right to the exclusive possession of the premises but only the right to use them, then—no matter what the words used—the grant will operate as a license and not as a lease.

[Authorities: *Marshall v. The Industrial Exhibition Association of Toronto et al.* (1900) 1 O. L. R. 319 [Div. Ct.]; (1902) 2 O. L. R. 62 [C.A.]; *Flynn v. Toronto Industrial Exhibition Association* (1905) 9 O. L. R. 582 [C.A.]; *Just v. Stewart* (1913) 23 M. R. 517; 4 W. W. R. 780; 24 W. L. R. 433; (Curran, J.) and other cases *passim*.]

“It is not . . . a question of words but of substance,” Lord Davey said in *Glenwood Lumber Company v. Phillips* [1904] A.C. 405 (P.C.): “If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.” And the Court held that Timber Licenses under C. S. Newfoundland, s. 51, c. 13 (2nd Series) were demises of the land.

Putting the document in the form of a lease and calling the parties landlord and tenant, cannot make a license into a lease: *Edwardes v. Barrington* (1901) 85 L. T. 650 [H. L.].

In *Royal Trust Co. v. Bell* (1909) 12 W. L. R. 546 (Alta.), Beck, J., had to consider the case of an agreement made by lessees of an hotel with a dining-room “manager.” He held that the agreement was not a lease—that the relation created was that of employer and employee. He said, at p. 552: “The agreement in question here has evidently been designedly drawn so as to exclude every appearance of a lease,” and quoted the words of Williams, L.J., in *Daly v. Edwardes* (1900) 83 L. T. N. S. 548 [C.A.], who called the document there in question “a grant of a privilege or license masquerading as a lease.”

The question is “Does the grantee get exclusive possession of or sole dominion over the premises or some

defined portion thereof?" If the answer be "yes," it is a lease, otherwise it is a license: *Selby v. Greaves* (1868) L. R. 3 C. P. 594; *Smallwood v. Sheppards* [1895] 2 Q. B. 627.

### *Métayer Agreements.*

M., the owner of a farm, agreed with O. to work it on shares, each supplying one-half the seed and labour, and to have half the profits. O. was to pay \$60 for implements and \$160 a year. O. was not placed in possession of any distinct portion of the farm; he and M. were equally in possession of the whole. It was held that the relation of landlord and tenant was not created and M. could not distrain for the \$160, which was not rent: *Oberlin v. McGregor* (1876) 26 U. C. C. P. 460; *Selby v. Greaves*, *supra* (p. 11), and *Hancock v. Austin*, *infra* (p. 12) applied.

In *Macklem v. Macklem* (1890) 19 O. R. 482, Boyd, C., held that a métayer arrangement by which the owner of land arranged with one O. to work the land on shares and to divide the produce equally with him was not a tenancy. The arrangement was made without a lease, merely for one season and there was no visible occupation by one more than the other. *Hayden v. Crawford*, [p. 258, *post*], was distinguished because there was a lease.

*West v. Atherton* (1853) 7 N. B. R. 653, held that a person working a farm on shares and occupying part of the house jointly with the owner of the farm has not such a tenancy as to prevent the owner from maintaining an action of trespass against a third person.

Reference should also be made to *Dacksteder v. Baird* (1849) 5 U. C. R. 591; *Park v. Humphrey* (1864) 14 U. C. C. P. 209; *Ferguson v. Savoy* (1855) 9 N. B. R. 263, and *Mulherne v. Fortune* (1859) 8 U. C. C. P. 434.

### *A Mere License.*

A mere license passes no interest in the premises, but is simply permission to do an act or series of acts on the

premises of the licensor—making acts lawful which without it had been unlawful.

*McKenzie v. McGlaughlin* (1885) 8 O. R. 111; *Muskett v. Hill* (1839) 5 Bing. (N.C.) 694; *New Brunswick Lumber Co. v. Kirk* (1852) 6 N. B. R. 443; *Breckenridge v. Woolner* (1854) 8 N. B. R. 303.

It may be in writing or by parol and is not within the Statute of Frauds.

It is always revocable upon reasonable notice by the grantor, for example—by sale of the property: *Hendry v. Scott* (1873) 9 N. S. R. 215; *Connor-Ruddy Co. v. Robinson-Whyte Co.* (1909) 19 O. L. R. 133 [Div. Ct.], following *Kerrison v. Smith* [1897] 2 Q. B. 445, *Credit-Foncier Franco-Canadien Co. v. Lindsay Walker Co.* [p. 17, *post*], although damages may be given for its breach: *ib. Connor-Ruddy Co. v. Robinson-Whyte Co.*

A licensee under a revocable license is entitled to notice of revocation and a reasonable time afterwards to remove his goods, and if without such they are removed and injured in the process he will be entitled to damages: *Mellor v. Watkins* (1874) L. R. 9 Q. B. 400; see also *Keys v. Guy* (1875) 36 U. C. R. 356, noted at p. 205, *post*.

It cannot be assigned like a lease to a third party: *Muskett v. Hill* (*supra*), if it does not include “assigns” *Naegele v. Oke* (1916) 37 O. L. R. 61.

The licensor has no right to distrain: *Hancock v. Austin* (1863) 14 C. B. (N.S.) 634.

### *A License Coupled with an Interest.*

A license coupled with a valid grant or interest is irrevocable: *Connor-Ruddy Co. v. Robinson-Whyte Co.* (*supra*): and may be assigned: *Naegele v. Oke* (*supra*).

As to the differences between a license and a lease, see also 18 Hals. 770 and 771, and *Robinson v. Fee* (1880) 42 U. C. R. 448.

Compare *Glenwood Lumber Co. v. Phillips* (*ante*) with *Wilson v. Taverner* [1901] 1 Ch. 578-581.

### *Examples of Licenses or Special Agreements.*

An agreement giving a “tenant” so called the “sole and exclusive license and privilege” to sell newspapers,



books, etc., at a railway station and the liberty to erect bookstands, held to be a license merely: *Smith v. Lambeth* (1882) 10 Q. B. D. 327; 48 L. T. 57 (C.A.).

It was held that there was no present demise, the final arrangements not being made; that A. had only a license to enter and plough, which license was revoked by the entry of the defendant, the owner of the fee, in *Stubbs v. Broddy* (1877) 27 U. C. C. P. 234.

*Janes v. O'Keefe* (1896) 26 O. R. 489; 23 A. R. 129 [C.A.] 16 Occ. N. 41, was the case of a demise of lands with a privilege to build over a lane in the rear: see this case at p. 278, *post*.

*In re Benfield v. Stevens* (1897) 17 P. R. 300, 339: 17 Occ. N. 10-60, the document was held to be a mere license to mine, not conferring exclusive possession.

An agreement under seal providing for the use of a race track under certain conditions, and in consideration of certain payments, was held to be a mere license and not a lease: *Lyles v. Windsor Fair Grounds, etc. Assn.* (1898) 20 Occ. N. 363 [Ferguson, J., Ont.].

In *Hauen v. Hughes* (1898) 27 A. R. 1: 20 Occ. N. 55, an agreement was held to be a license to mine and not a lease.

In the Marshall case [see p. 10, *supra*], the plaintiff bought the privilege of selling refreshments from stands located under one of the exhibition buildings leased by the defendants, from 8 a.m. to 10 p.m., during the period of an exhibition to be given. It was held that the plaintiff under the contract set out was not a lessee of the premises, "for she had no right to the continuous possession of the stands, but only the right to sell from them during a part of the time": *Rendell v. Roman* (1893) 9 Times L. R. 192; *Lynch v. Seymour* (1888) 15 S. C. R. at p. 352, followed.

*Flynn v. Toronto Industrial Exhibition Assn.* [p. 10, *supra*] was a similar case. Garrow, J.A., said at p. 587: "There is no demise of any land—no land is, in fact, described, so as to be ascertained, although this alone might not be sufficient if land had afterwards been pointed out and taken possession of by the tenant. But

the intention of the parties at the time, as expressed in the instrument, is important where the matter is in doubt: see *Taylor v. Caldwell* (*infra*). And the extensive reservation of powers of superintendence and control, including cancellation, and the insertion of the covenant of indemnity are each and all circumstances of considerable, and combined, of conclusive, potency to indicate that a lease with the right of exclusive possession was not intended." Osler, J.A., also held it was a license, following *Taylor v. Caldwell* (1863) 3 B. & S. 826, at p. 832 [see p. 296, *post*]; *Regina v. Morrish* (1863) 32 L. J. M. C. 245.

A document granting the exclusive right to enter upon certain lands of the grantor and search for petroleum and gas, by which it was provided that such "lease" should be void if a well were not commenced within six months from its date, unless the lessee should thereafter pay yearly to the lessor \$50 per year for delay, was held to create a right of *profit à prendre* which entitled the grantee to possession for the purpose mentioned: *McIntosh v. Leckie* (1906) 13 O. L. R. 54; 8 O. W. R. 490; 26 Occ. N. 804 [Boyd, C.].

The privilege of posting bills upon the wall of a house was held to be a license, although put in the form of a lease: *Connor-Ruddy Co. v. Robinson-Whyte Co.* (1909) 19 O. L. R. 133 [Div. Ct.]; 14 O. W. R. 284. *Credit-Foncier Franco-Canadien v. Lindsay-Walker Co.* [p. 17, *post*].

In *Just v. Stewart* [p. 10, *supra*] merely allowing a real estate firm to put their cards in the windows, to use any part of the premises any time of the day and to make sales there, the sole control remaining in his own hands, was held not to be a letting by a tenant—the real estate firm were merely licensees: *Peebles v. Crossthwaite* (1897) 13 T. L. R. 198; *Mashiter v. Smith* (1887) 3 T. L. R. 673, followed.

In *Carmangay v. Snyder* (1914) 8 W.W.R. 567 (Alta.), an agreement purporting to be for a lease provided that the crop payment rentals, having been paid for ten years, they were to be applied upon the purchase price

of the land at \$26 an acre, and that "the contractor shall thereupon become and be the purchaser thereof and entitled to receive a transfer in fee simple . . . free from encumbrances." McCarthy, J., held that the instrument was an agreement for sale and not a lease.

By agreement between A. and B., A. was to farm B.'s land during a certain farming season; to harvest and thresh the crop which was to be divided evenly—each was to pay half the cost of threshing. A. took possession and seeded the land. Later B. sold to C. subject to the agreement. Held that the agreement was at any rate a license, and C. had confirmed it: *Gardner v. Staples* (1915) 30 W. L. R. 860; 8 W. W. R. 397; 8 Sask. L. R. 149.

Permission to draw water from neighbouring land and to instal an hydraulic ram for that purpose, was held to be a personal license which did not bind the land or the grantee of the licenser: *Naegele v. Oke* (1916) 37 O. L. R. 61 [App. Div.] applying *Ward v. Day* (1863) 4 B. & S. 337; *Stockport Water Works Co. v. Potter* (1864) 3 H. & C. 300; *Watkins v. Milton-next-Gravesend Overseers* (1868) L. R. 3 Q. B. 350; and *Glenwood Lumber Co. v. Phillips* [1904] A. C. 405.

Where the owners of a private stable gave certain persons permission to stable horses in it, but did not assign them any definite portion of the stable, it was held that the relationship of landlord and tenant did not exist, but one akin to that of licenser and licensee: *Gunn v. Canadian Pacific Ry. Co.* (1911) 1 W. W. R. 804 (C. A.); 22 M. R. 32; 20 W. L. R. 219; 1 D. L. R. 232.

Where in substance the transaction was a lease of land with a reservation to the lessor of a room in the house and stable room and pasturage for eight horses, Walsh, J., held the effect was to give the tenant exclusive right of occupation, subject to these reservations, and it was a lease and not a mere license: *Fabrie v. Hewlemaus* [1919] 2 W. W. R. 146 (Alta.); 45 D. L. R. 744.

#### *Cases where the Agreements were held to be Leases.*

In an agreement were the words, "M. rents from B. lot 3 for pasture purposes." Instead of pasturing the

entire farm, M. cut hay from it. Held, that the affirmative words "for pasturing purposes" negatived its user for other and inconsistent purposes, and were equivalent to an express agreement to use the land for no other purpose. The parties were landlord and tenant, therefore M. owned the crop, but under the circumstances was restrained from disposing of it, or the landlord could have a declaration for damages: *Bradley v. McClure* (1908) 12 O. W. R. 215; 28 C. L. T. 778; 18 O. L. R. 503. On appeal it was held that the tenant could not sell the hay, but damages allowed were struck out as the words "for pasturing purposes" gave the tenant the right to feed the grass or to allow the grass to grow to hay and feed the latter: (1908) 12 O. W. R. 695; 28 C. L. T. 778; 18 O. L. R. 503 [Div. Ct.].

In *Decock v. Barrager* (1909) 19 M. R. 34; 10 W. L. R. 709 [C.A.], the Manitoba Court of Appeal held a Hudson's Bay Company hay permit was an actual lease of the land comprised in it, although the lessee was by terms limited to using the land for grazing purposes only, applying *Glenwood v. Phillips* [1904] A.C. 405. See *per* Perdue, J.A., at p. 37.

In *Struthers v. Chamandy* (1918) 42 O. L. R. 508; 14 O. W. N. 61, [App. Div.] the Court considered a special instrument, purporting to be a lease, made pursuant to the Short Forms of Leases Act, by which the lessors were permitted to continue their mining operations without hindrance, and to that end the lease provided for cancellation by the lessor on six months' notice. It was held that the document was a lease and not a mere license. Clute, J., said, p. 518: "The document itself is the answer to this argument (that it was a license); it does not purport to be a license; it is a lease, with a reservation of mineral rights and the right to work them."

In *Devine v. Callery* (1917) 40 O. L. R. 505 [App. Div.] it was held that the document there set out was a lease and not a mere license.

By an agreement between an owner of land and an advertising agent, the former agreed to let and the latter

to take an advertising station at a yearly rent, the tenancy to commence from completion of erection and to continue seven years, the agent to pay rates and taxes, it was held that a tenancy and not a mere license was thereby created: *Taylor v. Overseers Pendleton* (1887) 19 Q. B. D. 288; see also *Roads v. Trumpington Overseers* (1870) L. R. 6 Q. B. 56.

The owner of lands entered into an agreement with a bill posting company by which the company was permitted to erect and maintain on the lands an advertising hoarding which they were to be permitted, at any time, to remove. Taylor, J., held that the relationship of landlord and tenant was so created: *Credit Foncier Franco-Canadien v. Lindsay-Walker Co.* [1919] 2 W. W. R. 385, (Sask.). But the Court of Appeal [1919] 2 W. W. R. 925, held otherwise. Lamont, J.A., said, at p. 927:

“The first question is, were the defendants under their agreement with Eliza Weeks tenants of the land or only licensees? This point seems to me to be settled by *Provincial Bill-Posting Co. v. Low Moor Iron Co.* [1909] 2 K. B. 344; 78 L. J. K. B. 702. In that case, the plaintiffs and defendants agreed that the plaintiffs should erect on the land of the defendants a hoarding for bill-posting and advertising. That hoarding was affixed to the soil in the same manner as the one in question in this case. As remuneration for the privilege, the plaintiffs agreed to pay the defendants a stated rent. The plaintiffs omitted to pay the rent, and the defendants distrained on the hoarding. It was held that there was no right of distraint, because the agreement created only a license and not a tenancy. In his judgment, at p. 706 (78 L. J. K. B.), Buckley, L.J., said: ‘The agreement gives the plaintiffs the exclusive right of posting bills and exhibiting advertisements upon certain land of the defendants and of fixing hoardings and doing all that is usual and proper in order to utilize the premises for bill-posting and advertising purposes for a certain term at the rent and on the conditions specified. It seems to me that this agreement created nothing more than a license

to go on the land of the defendants and do something there.' The defendants in the present case are, therefore, licensees and not tenants, but, as licensees, having entered upon the land and erected their hoarding, they were in possession."

*Cases where the matter was not decided.*

An agreement by a lessee of a theatre with a person who was thereby given the exclusive right to use the refreshment rooms and bar of a theatre for the purpose of supplying refreshment, was held to be a special agreement and not a sub-lease: *Daly v. Edwardes* (1900) 17 T. L. R. 115.

The words used in *Lynch v. Seymour* (1888) 15 S. C. R. 341 (Ont.), in a document purporting to be under the Short Forms of Leases Act (as to which see p. 127), were "give, grant, demise, and lease the exclusive right, liberty, and privilege of entering at all times in and upon that certain tract of land situate . . . reserving that portion thereof occupied or hereafter to be occupied as roadway by a railway company, and with agents to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises." The lessees were also to have the right to use such timber found on the premises as might be required to carry on their operations, and such use of the surface as might be necessary for all the purposes appertaining thereto, also to pay taxes and to do statute labor assessed upon the premises, and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or to carry on any business that might be deemed a nuisance thereupon. And there was a proviso that on the termination of the lease the lessor should have quiet possession, a proviso for re-entry in case of forfeiture and a covenant by the lessor for quiet enjoyment.

Patterson, J. (1884) 7 O. R. 471, held the document to be a license; the Full Court of Queen's Bench held it to be a lease (1888), 13 A. R. 525: the Judges of the Court of Appeal [14 A. R. 738] were evenly divided, as were the Judges of the Supreme Court: Ritchie, C.J.,

Henry and Taschereau, JJ., holding it to be a lease; Strong, Fournier and Gwynne, JJ., *contra*.

The agreement in respect of which the action of *Halpin v. Fowler* (No. 2) (1907), 5 W. L. R. 226 [Full Ct. of B.C.] was brought was held, Martin, J., dissenting, to be neither a lease nor a license, inasmuch as there was no defined area of which exclusive possession was given (the width not being stated,) and the property in the ore was not intended to be given to the plaintiff.

A huckster occupied a market stall assigned to her by the city authorities. The market was established by the municipal corporation; and by by-law no stall could be assigned for a longer period than one week; and it was then occupied only for certain hours each day. Clute, J., at the trial, held that the huckster was a licensee, not lessee, but not a mere licensee. The Appellate Division were divided. Mulock, C.J., did not consider the question. Sutherland, J., agreed with Clute, J., but held the result of the matter in issue was the same whether she were a licensee or lessee: as did Riddell, J., who inclined to the opinion that she was a tenant: *Wood v. City of Hamilton* (1912) 28 O. L. R. 214 [App. Div.].

The Court in *West v. Mayland* (1913) 4 W. W. R. 851, 23 M. R. 488 [Man.—C.A.] did not decide whether a document in the form of a lease under the Manitoba Short Forms Act “for grazing purposes only” was a lease or merely a license.

In *Gardner v. Staples* (1915) 8 W. W. R. 397, 30 W. L. R. 860; 8 Sask. L. R. 149 [Ct. en B.], the Full Court did not decide whether an agreement by which one party was to “till and farm” certain lands during the farming season was a lease or a license. The agreement said nothing about possession, but the evidence was that the farmer “went into possession,” p. 398, *sed qu*.

See also *Rex ex rel. A.-G. [Can.] v. Paulson* [1920] 3 W. W. R. 372 [P.C.] 52 S. C. R. 317; 9 W. W. R. 1099; 15 Ex. Ct. R. 292.

### *Lodgers.*

See 18 Hals. s. 772.

As to protection of goods of lodgers in cases of distresses, see Article 72.

*Servants.*

See 18 Hals. s. 773.

Permission given to a farm labourer to use and occupy a cottage on the farm during the employment, with an agreement that the use and occupation should cease and terminate with the employment, does not create the relationship of landlord and tenant: *McNeely v. Carey* (1914) 7 W. W. R. 689 [Alta.—Co.Ct.]; and see *Hemming v. Stoke Poges Golf Club*, referred to at p. 891, *post*.

Though a coachman and gardener, etc., are merely servants and not tenants: *Dobson v. Jones* (1844) 5 M. & G. 112; 13 L. J. (C. P.) 26; still the relationship of master and servant will not prevent that of landlord and tenant, and if servants are permitted to occupy a house either as part remuneration or for the more convenient performance of their services, they are tenants, and if the occupation is to cease with the service it is a tenancy at will: see *Hughes v. Chatham Overseers* (1843) 5 M. & G. 54; 13 L. J. (C. P.) 44; *Smith v. Overseers*, (1875) L. R. 10 Q. B. 422; 32 L. T. 859.

### WHO MAY BE LANDLORD AND TENANT.

ARTICLE 3.—Subject to the provisions of the various statutes hereinafter referred to all persons capable of contracting and seised or possessed of lands and tenements may grant leases thereof for any period commensurate with their respective interests, and all persons capable of contracting may take the same.

[Authorities: 18 Hals. ss. 755 *et seq.* and the cases noted *infra, passim*].

### THE GENERAL STATUTORY PROVISIONS.

*Dower Acts.*

The three provinces of Saskatchewan [in 1915]; Alberta [in 1917] and Manitoba [in 1918] have passed



so-called "Dower" or "Homestead" Acts which require careful consideration. The effect of all three Acts is that no married man (in Manitoba no married man or woman) may make any transfer or lease of the homestead as in the Acts defined without the consent of his wife—or in Manitoba of the wife or husband as the case may be.

### *The Saskatchewan Act.*

The Act as originally passed was chapter 29 Statutes of 1915. This was amended in 1916 by c. 27 and in 1917 by c. 34, 2 Sess. s. 44.

"Homestead" is defined by s. 1. Then s. 2 (1916) provides that the wife must sign or consent to all "leases," etc. By s. 6 (1915) the wife may file a caveat to protect her interest. Section 5 (1) permits a lease to be made by a man who can make an affidavit that he has no wife or that the land demised is not his homestead. This affidavit is conclusive in favour of the lessee by s. 5 (3) of 1916.

By s. 7 (a) [2 (2) 1916]: Where the wife is living apart under circumstances disentitling her to alimony or is a lunatic or a person of unsound mind, a Judge of the Supreme Court may dispense with the consent of the wife.

By s. [2 (4)] 7 (3). Upon such order being filed with the registrar . . . he shall register the . . . lease . . . or other instrument. . . .

Section 10 (1917): provides that a married woman of whatever age is to be *sui juris* for the purpose of the Act.

Section 4 of 1916 applies in the case of death.

### *The Alberta Act.*

This Act passed in 1917 as cap. 14, was amended and added to by 1918, c. 4, s. 53, and amended in 1920 by c. 40.

"Homestead" is defined by s. 2 (a) (1917).

"Disposition" is defined as "every transfer, sale, mortgage and every other disposition by act *inter vivos*

and every devise or other disposition made by will," by s. 2 (c).

By s. 3 every disposition shall be null and void unless made with the consent in writing of the wife if living.

Sec. 6 provides that the consent shall be produced and registered with the instrument effecting such disposition.

The Act of 1918 (c. 4, s. 53) added (*inter alia*) ss. 7 (1), and 7 (3), corresponding to ss. 2 (2) and 2 (4) of the Saskatchewan Act of 1916 and s. 9 (a) corresponding to s. 10 of the Saskatchewan Act of 1917.

By the Alberta Married Woman's Home Protection Act (1915) 5 Geo. V. c. 4, s. 1, any married woman may file a caveat against the registration of any lease by her husband affecting their "homestead," and so long as such caveat remains in force no such lease shall be registered, s. 4. The caveat may be lapsed on originating notice, s. 7.

### *The Manitoba Act.*

This Act was passed in 1919 as c. 26, which repealed the Act of 1918. The new Act is the most elaborate, but its principal provisions are in effect similar to those in the Acts of Saskatchewan and Alberta.

By s. 2 (1) "homestead" is defined.

By s. 2 (2) disposition is defined and includes a lease for more than 3 years, but not one for less.

By s. 3 every disposition is to be invalid and defective unless the Act is complied with.

By s. 8 (3) the certificate of acknowledgment is to be conclusive evidence of its truth.

By s. 11 (1) (a) the cases of a wife living apart from her husband for two years or more, and by s. 11 (1) (b) a lunatic or person *non compos mentis* are provided for; a County Court Judge may on application dispense with the certificate.

By s. 21 the husband is given the same rights in his wife's homestead.

A wife named as one of the lessors with her husband, the other lessor executed a lease of the husband's homestead for the lifetime of the lessors or the survivor of

them. The rent reserved was payable one-half to each. There was no acknowledgment of consent by the wife as required by the Act. The husband and wife sued to set the transaction aside as contrary to the Act. Walsh, J., dismissed the action and on an equal division of the Court his judgment was affirmed: *Overland et al. v. Himelford* [1920] 2 W. W. R. 481 [Alta.—App. Div.]. And see (1920) 10 Geo. V. c. 40, s. 7 [Alta.].

A doweress, as soon as her dower is properly assigned, is entitled to claim possession of the land assigned to her even as against a tenant claiming under a subsisting lease made by her late husband during coverture without her consent; but until her dower has been assigned she has no estate in the land out of which she is entitled to dower: *Allan et al. v. Rever* (1902) 4 O. L. R. 309 [Street, J.].

### *Homestead Lands.*

A lease of homestead lands is an assignment or transfer of the rights which a homesteader has by virtue of his entry and so void under the Dominion Lands Act: *Klinck v. Geer* (1910) 3 Sask. L. R. 157; 14 W. L. R. 282. And so is a lease of pre-emption lands: *Bunce v. Gavin, etc., Co.* (1916) 10 W. W. R. 797 [Sask.—Dickson, D.C. J.], but corn grown upon the lands by the lessee is his property and not that of the lessor.

### *Noxious Weeds Act.*

In Manitoba the Noxious Weeds Act, R. S. M. 1913, c. 145, s. 18 [amended by (1916) 6 Geo. V. c. 80, s. 1 (13) and (1917) 7 Geo. V. c. 65, s. 9, prohibits the renting of any land infested with noxious weeds after the owner has been given the notice provided for in the Act.

### *Public Health Acts.*

The Public Health Acts of most of the provinces prohibit leasing houses or premises in which there have been contagious or infectious diseases until proper disinfection has been made.

Alberta: (1910) 10 Edw. VII. c. 17: Regulations Nos. 30 and 42.

British Columbia: See R. S. B. C. 1911, c. 98, s. 98.

Manitoba: See R. S. M. 1913, c. 159.

New Brunswick: (1918) 8 Geo. V. c. 36, see s. 32.

Nova Scotia: (1918) 8 Geo. V. c. 6, amended by (1919) 9 Geo. V. c. 70, s. 2, adding new sections 22 (1) and 22 (2), provides for vacating of premises and that rent is not to be payable until the condition is remedied and suspends actions, distresses or other proceedings to recover rent.

Ontario: R. S. O. 1914, c. 218, s. 69.

Saskatchewan: (1918-19) 8-9 Geo. V. c. 12, s. 74 (1).

*All Persons Capable of Contracting.*

See generally on this subject:—

18 Hals, ss. 775 *et seq.*

Agents, p. 25.

Aliens, p. 28.

Convicts, p. 28.

Corporations, p. 29.

Crown, p. 37.

Drunkards, p. 39.

Elegit Creditors, p. 40.

Equitable Owners, p. 40.

Executors, Administrators and Trustees, pp. 41, 59.

Guardians, p. 44.

Idiots and Persons *Non Compotes Mentis*, p. 45.

Indians, p. 46.

Infants, p. 46.

Judgment and Execution Debtors, p. 50.

Lunatics, p. 51.

Married Women, p. 53.

Mortgagors and Mortgagees, p. 213.

Personal Representatives, p. 54.

Persons having no Title, pp. 54 and 78.

Sequestrators and Receivers, p. 54.

Trustees of Settled Estates, p. 55.

Trustees, p. 41, and p. 59.

Unincorporated Societies, p. 59.

*Agents.*

An agent having sufficient authority may bind his principal by leases and agreements for leases made for him and in his name and on his behalf.

The agent must have sufficient authority and if the lease or agreement be under seal [see Article 5] the agent's authority to execute it must be under seal: 1 Hals. s. 339; *Harrison v. Jackson* (1797) 7 T. R. 207, unless executed in the name and presence of the principal at his request: 11 Encyc. Laws of England, p. 489.

But if the agreement, whether for less or more than three years, be not under seal, the agent's authority need not be under seal nor even in writing, notwithstanding the 4th section of the Statute of Frauds: *Coles v. Trecothick* (1804) 9 Ves. 234-250.

The authority of the agent to sign must be proved, if disputed, in an action or suit against the principal: *Ridgway v. Wharton* (1854) 3 DeG. M. & G. 677, 676; *Spedding v. Nevell* (1869) L. R. 4 C. P. 212, followed in *Gibbins v. Smith* (1908) 11 O. W. R. 563 [MacMahon, J.]; 12 O. W. R. 7 [Div. Ct.].

An agent to execute should execute in the name of his principal and not in his own name only: *Tanner v. Christian* (1855) 4 E. & B. 591; *Parker v. Winslow* (1857) 7 E. & B. 942, 947, affirmed in *Gibbins v. Smith* (*supra*).

In *Mitchell v. The Mortgage Co. of Canada* [1919] 3 W. W. R. 324; 59 S. C. R. 90 [S. Ct. Can.—Sask.], [1918] 3 W. W. R. 838; 43 D. L. R. 337 [C. A.], Idington, J., said (p. 326): "The question of agents signing their own name instead of the respondent's was not very seriously pressed in argument, but is amply answered in the authorities cited in Leake on Contracts, 4th ed. 189; and in Fry on Specific Performance, 4th ed. 236; and see also the case of *Rosenbaum v. Belson, Ltd.* [1900] 2 Ch. 267; 69 L. J. (Ch.) 569, and the case of *Drughorn, Ltd. v. Rederiaktiebolaget Transatlantic* [1919] A. C. 203; 88 L. J. (K. B.) 233; 120 L. T. 70."

See as to guarantee of rent by an agent to lease: *Lunt v. Perley* (1917) 44 N. B. R. 439; 35 D. L. R. 214.

If an agent represents that he has authority to sign and he has none he will be personally liable: *Fenn v. Harrison* (1791) 4 T. R. 758; *Spedding v. Nevell* (1869) L. R. 4 C. P. 212; *Gibbins v. Smith* (*supra*).

A landlord may enforce an agreement for a lease made for him by an agent in the agent's own name: *Pulford v. Loyal Order of Moose* (1913) 5 W. W. R. 452; 23 M. R. 641; 25 W. L. R. 868 [C. A.], reversing (1912) 4 W. W. R. 63; 23 W. L. R. 525, and approving *Commings v. Scott* (1875) L. R. 20 Eq. 11, at pp. 15, 16; 44 L. J. Ch. 563; *Morris v. Wilson* (1859) 5 Jur. (N. S.) 168, and *Filby v. Hounsell* [1896] 2 Ch. 737; 65 L. J. Ch. 852.

As to a lease of premises to an agent and the surrender of the same, see *Telfer v. Brown* (1899) 19 C. L. T. 232 [Street, J.].

If an agent acts without sufficient authority, his acts may subsequently be adopted and ratified by his principal: *Fitzmaurice v. Bayley* (1856) 6 E. & B. 868; 8 E. & B. 664; 9 H. L. Cas. 78, as by re-delivery of the lease or anything tantamount thereto: *Shep. Touch.* 57; *Tupper v. Foulkes* (1861) 9 C. B. N. S. 797; 30 L. J. (C. P.) 214. An agent, without authority under seal, by deed, leased land for seven years, and the lease when signed was delivered to the principal, and he several times requested the agent to go and see whether the lessee had performed his covenants under the lease. The principal never objected to the lease, but went on the lot and had it surveyed after the lessee took possession of it, and this was held an adoption of the agent's act, and that the lease was binding on his principal: *Pettigrew v. Doyle* (1867) 17 U. C. C. P. 34, 459.

A person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant. One of the true owners afterwards took an assignment of the instrument and gave to the tenant notice of the assignment, and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for and otherwise recognized the existence of

the agreement, and the Court held that it was thereby confirmed: *Simmons v. Campbell* (1870) 17 Gr. 612; and see *McCune v. Good* (1915) 34 O. L. R. 51 [App. Div.].

As to the liability of an agent renting offices for a foreign principal, see *O'Neill v. Wells* (1876) 11 N. S. R. 205.

As to the agent's authority to reduce rent, see *Bell v. Quagliotti* (1919) 26 B. C. R. 482 [C. A.].

### *Powers of Attorney.*

Ontario: The R. S. O. (1914) c. 106, s. 4 [The Powers of Attorney Act] enacts that a power of attorney shall not be revoked by the death of the constituent if it by any form of words so provides, or if it may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, and s. 3 (1) protects persons who act on the faith of a power of attorney which has been revoked by death or otherwise. And see s. 3 (2)—and 56-57 Vict. c. 53, s. 24 (part) [Imp.].

A power of attorney to make and execute any note, bond, or bonds, or other instrument or contract, and to make, execute, and acknowledge all contracts, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate all or any of the premises, will not, *prima facie*, authorize the attorney to accept and execute leases of real estate containing burthensome covenants on the part of the lessees: *Mayor v. Lockwood* (1844) 4 N. B. R. 443.

### *Similar Legislation.*

Alberta: 1906, c. 24, ss. 72, 73 [Land Titles Act].

British Columbia: See R. S. B. C. 1911, c. 16, s. 2.

Manitoba: R. S. M. 1913, c. 200, ss. 53, 54 [Trustee Act]; c. 171, s. 166 [Real Property Act].

New Brunswick: C. S. N. B. 1903, c. 152, ss. 50, 51, 52 [The Property Act].

Saskatchewan: 1917 (2nd Sess.) 7 Geo. V. c. 18. [Land Titles Act].

In *Matthewson v. Burns* (1913) 30 O. L. R. 186 [App. Div.] it was held that the power of attorney was wide enough to authorize the agent to lease lands and in the lease give an option to purchase.

### *Aliens.*

#### *Statutory Provisions.*

Aliens now have the same powers as to real estate as natural-born Canadian subjects in:—

British Columbia: R. S. 1911, c. 9, s. 2.

Manitoba: R. S. M. 1913, c. 5, s. 2.

New Brunswick: C. S. N. B. 1903, c. 157.

Nova Scotia: R. S. N. S. 1900, c. 136, ss. 1, 2, 3.

Ontario: R. S. O. 1914, c. 108, s. 2.

And see I. Encyc. L. of E. 297; 1 Hals. 675.

In *Halsey v. Lowenfield* [1916] 2 K. B. 707; 85 L. J. K. B. 1498 [C. A.] it was held that an alien enemy remained liable on his covenant to pay rent contained in a lease executed before the war.

As to the rights of alien enemies during war time see *Topay v. Crow's Nest Pass Coal Co.* (1914) 24 W. L. R. 555; 7 W. W. R. 223; 18 D. L. R. 784.

*Pescovitch v. Western Canada Flour Mills Co.* (1914) 28 M. R. 783; 29 W. L. R. 900; 7 W. W. R. 454; 18 D. L. R. 786.

*Bassi v. Sullivan* (1914) 26 O. W. R. 813; 7 O. W. N. 38; 18 D. L. R. 452; 32 O. L. R. 14.

*Kristo v. Hollinger, etc., Co., Ltd.* (1918) 41 O. L. R. 51; 13 O. W. N. 206.

*Lampell v. Berger* (1917) 40 O. L. R. 165; 38 D. L. R. 47.

*Reventlow-Criminil v. R. M. Streamstown* [1917] 3 W. W. R. 546; 37 D. L. R. 394 [Alta.]; 1 C. E. D. 139.

### *Convicts.*

The fact that a person is undergoing confinement in a penitentiary as a punishment for an indictable offence does not deprive him of his property nor interfere with



his freedom of contract: *Dumphy v. Kehoe* (1891) 21 Rev. Leg. 119 (Que.), followed. The Imperial Forfeiture Act; (1870) 33-34 Viet. c. 23, providing for the appointment of an administrator to a convict's property and forbidding him to alienate the same or to contract, is not in force in Canada: *Young v. Carter* (1912) 26 O. L. R. 576; 22 O. W. R. 643; 3 O. W. N. 1486; 5 D. L. R. 655 [Boyd, C.]. In dismissing the plaintiff's action to set aside a renewal of a lease of hotel premises, executed by him while in prison, serving a sentence for perjury—there being cause for relief on the grounds of duress, etc.—the Chancellor discussed s. 1033 of the Criminal Code [R. S. C. 1906, c. 146], which provides that “no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se*, shall cause any attainder or corruption of blood or any forfeiture or escheat. . . .”

See 9 Hals. s. 826; 3 Ency. L. of E. (2nd ed.), p. 593, and *Carr v. Anderson* [1903] 1 Ch. 90; 2 Ch. 279, as to the English Law.

### *Corporations.*

#### *Municipal—Financial—Church.*

A municipal or civil corporation may at common law grant such leases as it pleases consistently with its own estate, by-laws and statutes: *Smith v. Barrett* (1657) 1 Sid. 161.

*Semble*, a lease by a corporation is validly executed if the corporate seal is affixed by the proper custodians: *Palmer v. Mail Printing Co.* (1897) 28 O. R. 656; 18 Occ. N. 62 [Ont.—Boyd, C.].

The general law is that corporations cannot make any disposition of their property otherwise than by deed sealed with their common seal, thus they cannot without deed make a lease for years, but of late years this rule has been much relaxed.

“Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time

had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like. But in process of time, as new descriptions of corporations came into existence, the Courts came to consider whether these *exceptions* ought not to be extended in the case of corporations created for trading and other purposes": Bovill, C.J., in *South of Ireland Colliery Company v. Waddle* (1868) L. R. 3 C. P. 463, quoted by Gwynne, J., in *Bernardin v. Mun. of N. Dufferin* (1891) 19 S. C. R. 581 [Man. App.], at p. 588, and see the remarks of the same Judge in *Kingston and Bath Road Co. v. Campbell* (1892) 20 S. C. R. 605, at p. 616 [Ont. App.].

The *exceptions* referred to by Bovill, C.J., are stated in *Lawford v. Billericay Rural Council* [1903] 1 K. B. 772, and in effect are:

"1. Where work done for the corporation is of a trivial nature.

"2. Where the claim relates to a matter of so frequent occurrence that it must of necessity be complied with without waiting for the formality of a seal.

"3. Where work is done in respect of matters for the doing of which the corporation was created, and the benefit of the work is accepted by the corporation," per Richards, J.A., in *Richardson v. Urban Mutual Fire Ins. Co.* (1916) 26 M. R. 372 [C. A.], at p. 378.

In the result all *executed* contracts of a corporation, which with a seal would have been lawful, are binding upon the corporation even if not under seal: Parker and Clarke, 243.

In the case of *executory* contracts the rule is different: *Ib.*, 244.

Where the *executory* contract is one within the purposes for which the company was incorporated the company will be bound, it need not be under the seal of the company. *South of Ireland Colliery Co. v. Waddle* (*supra*): *Richardson v. Urban Mutual* (*supra*), per Cameron, J.A., dissenting, at p. 389.

But where the *executory* contract is one not within the purpose for which the company was incorporated the company will not be bound unless the lease is under the seal of the company: *Finlay v. Bristol and Exeter R. W. Co.* (1852) 7 Exch. 409, where Alderson, B., said that the occupation of premises for a year is not either a matter of daily occurrence or of so trivial a character as to enable the corporate seal to be dispensed with.

This is the law that has been generally applied, but there is a difference of judicial opinion as to whether *Finlay v. Bristol, etc., Co.* was not overruled by the *South of Ireland Case*.

The suggestion is made by Sir Frederick Pollock [Contract—6th ed. 146; 8th ed. 157], that it is, and see the observations of Sir William Meredith (C.J.O.), in *Bain v. Anderson* (1896) 27 O. R. at 373.

Cameron, J.A., expressly holds that it is overruled in *Richardson v. Urban Mutual (supra)*, p. 393. Riddell, J., did not decide the point in *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 [App. Div.]. See at p. 182 where he collects the authorities.

The contrary view is held in *Garland v. Northumberland Paper Co.* (1899) 31 O. R. 40; 19 Occ. N. 274 [Div. Ct.]. See the authorities collected and discussed by Boyd, C., at p. 47; *Richardson v. Urban Mutual (supra)* [Man.—C.A.]; *Re D. & S. Drug Co.* (1916) 10 W. W. R. 612, but in the same case; *In re the D. & S. Drug Company, Donald's Claim* [1917] 1 W. W. R. 374; 10 Alta. L. R. 266 [App. Div.], it was held that an admission in a stated case that the occupation of certain premises by a company "was referable" to a resolution (purporting to accept an offer of the tenancy of such premises, but invalid by reason of the vote of an interested director (owner of the premises)), was equivalent to an admission that the company took possession pursuant to the terms of the offer, and that said taking of possession of the premises was with the knowledge of all the shareholders and directors and

therefore constituted a tenancy on the terms of the offer. And see the discussion of the authorities in Parker and Clarke, p. 244, and Masten and Fraser, pp. 105, 106, 126, 127, and 132.

See the notes to Article 45, where these cases are further discussed, and *Wilkes v. Home Life Association of Canada* (1904) 8 O. L. R. 91 [Div. Ct.].

In *Sun Electric Co. v. McClung* (1913) 25 W. L. R. 43, and see p. 345, *post* [Sask.—Parker, M.C.], it was held, following *Garland Mfg. Co. v. Northumberland, etc., Co.*, that the lessor corporation was not bound by an oral agreement of its secretary-treasurer to extend the (defendant) tenant's term as no authority to the secretary-treasurer was shown and the agreement was not one coming within the purposes for which the corporation was formed or any purposes ancillary or incidental thereto.

And it cannot now be doubted that where a lessee is by a corporation aggregate put into possession of premises under a parol demise for a year, and has enjoyed the property and the benefit of the contract, the relation of landlord and tenant is created, and that this is recognized in law as an exception to the common law rule that a corporation aggregate can only demise by deed under their common seal, is too well established to be questioned: *Kingston and Bath Road Co. v. Campbell* [*ante*, p. 30]; *County of Frontenac v. Chestnut* (1851) 9 U. C. R. 365; *Ecclesiastical Commissioners v. Merral* (1869) L. R. 4 Ex. 162; 38 L. J. (Ex.) 93.

One who enters upon, occupies, and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation but not sealed with their common seal, becomes tenant from year to year of the corporation on such terms of the demise as are applicable to a yearly tenancy: *Ecclesiastical Commissioners v. Merral* (*supra*), but see *Wash v. Lonsdale* (1882) 21 Ch. D. 9 [C. A.], and the cases noted in Article 6.

But a railway company cannot delegate all its powers and franchises, or in effect transfer its charter by way of lease: *Hinckley v. Gildersleeve* (1872) 19 Gr. 212.

In *Wealleans v. Canada Southern Ry. Co.* (1895) 24 S. C. R. 309; 15 Occ. N. 252, it was held [reversing 21 A. R. 297], that a railway company had power under its special Act to lease its road to a foreign company.

To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as plaintiff, who was an inhabitant of the town, well knew when he took it, and that before the term expired a decree was obtained against them in Chancery, of which plaintiff had notice before this action declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority and should not be renewed; it was held that this plea afforded no defence, for the defendants had power to lease land and there was nothing in their charter showing that they could not lease this particular land: *Wade v. Corporation of Brantford* (1860) 19 U. C. R. 207.

A company was incorporated by Act of Parliament to take over the property of an English company of the same name, but the Act did not transfer the property. The English company owned certain lands. The new company without a conveyance to it, leased them to S. S. brought ejectment against M. Held, he must be non-suited: *Stonehouse v. McGillivray* (1896) 16 Occ. N. 385 [Man.].

### *The Mortmain Act.*

Under penalty of forfeiture land shall not be leased to or for the benefit of any corporation in Mortmain except under a license in Mortmain or a statute for the time being in force: R. S. O. 1914, c. 103, s. 3.

The Mortmain Act, 9 Geo. II. c. 36 [Imp.], was repealed in Ontario and re-enacted with amendments in 1888: 51-52 Vict. c. 52.

7-8 Wm. III. c. 37 [Imp.], dealing with the license in Mortmain, was consolidated in the same Act and in Ontario the R. S. O. 1914, c. 103, to the same effect as the Act of 1888 applies.

In *Law v. Acton* (1902) 14 M. R. 246 [Richards, J.], it was held that 9 Geo. II. c. 36, is in force in Manitoba, the Court saying, p. 248: "The Act has been repeatedly held to be in force in Ontario, except as limited by provincial statutes; and such holding has been approved by the Supreme Court of Canada in *Macdonell v. Purcell* (1893) 23 S. C. R. 101 [Ont. App.]. There is, I think, no doubt that, except as it may be affected by Provincial Statutes, the . . . Act is in force in Manitoba. . . ."

*Macdonell v. Purcell* was so decided because the Courts of Ontario had held the Act to be in force [*Doe d. Anderson v. Todd* (1845) 2 U.C.Q.B. 82; *Corporation of Whitby v. Liscombe* (1875) 23 Gr. 1], and the Legislature had recognized it as in force by the insertion in Acts authorizing corporations to hold lands, of the *non obstante* clause used in 3-4 Wm. IV. c. 78, viz.: the Acts of Parliament commonly called the Statutes of Mortmain or other Acts, laws or usages to the contrary notwithstanding.

In *Re Miller Estate* [1918] 1 W. W. R. 929; 11 Sask. L. R. 76, Elwood, J., held the statute was not applicable to the North-West Territories, and as it has not been recognized by any Ordinance of the Territories or Statute of Saskatchewan it was not in force in Saskatchewan, and he pointed out, p. 930, that *Law v. Acton* was incorrectly decided unless there had been—which did not appear from the report—legislative recognition of it in Manitoba.

Then in *Re Fenton* [1920] 2 W. W. R. 367 [C. A.], reversing [1920] 2 W. W. R. 34 [Galt, J.], the Court of Appeal for Manitoba held that the Act was not in force in Manitoba, overruling *Law v. Acton* (*supra*), which Galt, J., did not approve, but felt bound to follow.

The Ontario Act was considered in *Currie v. Harris Lithographing Co., Ltd.*; *A.-G. (Ont.) v. Harris, etc., Co.* (1917) 40 O. L. R. 290 [Masten, J.], 41 O. L. R. 475; 13

O. W. N. 326 [App. Div.], and Meredith, C.J.O., said, 41 O. L. R. p. 495: "It is . . . settled law that a Dominion company is subject to and bound to obey the statutes of the province as to Mortmain," and that this applied to a trading corporation.

It was also held that the words "of a statute for the time being in force" apply only to a statute of the province, and the words "His Majesty" mean (1) H. M. acting by the Lieutenant-Governor of the province, and (2) H. M. in the right of the province.

It was further held that the Mortmain Act is a law of general application [Judgment of Masten, J., affirmed on the above points]. The result was that the Dominion company not having a license in Mortmain was held not entitled to hold lands leased to it.

"An alienation to a company in Mortmain is not void but voidable only and can only be taken advantage of by the Crown: *McDiarmid v. Hughes* (1889) 16 O. R. 570," per Mathers, C.J., K.B., in *Campbell v. Morgan* [1919] 1 W. W. R. 268 [Man.], holding that the title to land acquired and held by an unlicensed foreign company is not invalid under s. 119 of the Companies Act (Man.) as against any other than the Crown.

The Act has been held not to be in force in British Columbia: *In re Pearse Estate* (1904) 10 B. C. R. 280, and in *New Brunswick: Ray v. Annual Conference of New Brunswick* (1881) 6 S. C. R. 308.

### *Banks.*

By the Bank Act (1913) 3-4 Geo. V. c. 9 [Dom.], s. 79, a bank may acquire and hold real and immovable property for its actual use and occupation, and the management of its business, and may sell or dispose of the same and acquire other property in its stead for the same purpose.

See also section 81 as to its power to purchase realty, and *Ontario Bank v. McAllister* (1910) 43 S. C. R. 338 per Duff, J., at p. 358.

*Church Corporations.*

By the Religious Institutions Act, R. S. O. 1914, c. 286, s. 10, trustees of any religious society or congregation may—with the consent of the congregation and subject to certain restrictions [10 (3)]—lease the lands of the society [10 (1)], and in the lease agree to renew and pay for improvements [10. (2)]. The trustees may also sue or distrain for rent in arrear [10 (4)], and see Articles 45 and 49, *post*.

The rights, powers and privileges conferred by the Act are extended to the Church of England, s. 22; to the Roman Catholic Church, s. 23, and to Jews, s. 24.

*Similar Legislation.*

Alberta: C.O. 38, s. 4—The trustees may lease land not at the time required for purpose of erecting a church, etc., for a term not exceeding 21 years. If the term is for more than 3 years the consent of the congregation is necessary. Section 5 permits a covenant for renewal for a further term of 21 years or less, or for payment for improvements. Section 6—Trustees are to have all the powers of landlords to recover rent and arrears of rent. And see s. 9 as to the annual statement by trustees required, and s. 20 as to execution of instruments.

British Columbia: R. S. B. C. 1911, c. 200, ss. 5, 6, 7 and 8.

Manitoba: R. S. M. 1913, c. 31, ss. 13, 14, 15 and 16 are similar except that the consent of the congregation is needed for any term.

Saskatchewan: R. S. S. 1909, c. 42, ss. 4, 5 and 6.

*Joint Stock Corporations.*

The Companies Acts of the various provinces give powers to purchase or take land on lease for the purpose of the undertaking of the company subject to restrictions as to holding, *e.g.*, in Ontario: R. S. O. 1914, c. 178, s. 24 (1) (b) 26, and Extra Provincial Corporations are



given similar powers. See, *e.g.*, Ontario: R. S. O. 1914, c. 179, s. 12. And see R. S. N. S. 1900, c. 136, s. 1.

See *Newhouse v. Northern Light and Power Co., Ltd.* (1914) 29 W. L. R. 249 [Macaulay, J.—Y.T.].

### *Municipal Corporations.*

May acquire or expropriate for the purposes of the corporation, and sell or otherwise dispose of the same when no longer required, as in Ontario: R. S. O. 1914, c. 192, s. 322 (1), and see generally: *Keay v. Regina (City)* (1912) 22 W. L. R. 185; 6 D. L. R. 327; 2 W. W. R. 1072; *Attorney-General et al. v. Toronto (City)* (1903) 6 O. L. R. 159; 23 Occ. N. 284 [Boyd, C.]; *Dalton v. City of Toronto* (1906) 12 O. L. R. 582; 8 O. W. R. 154 [C.A.].

### *The Crown.*

The sovereign is a corporation sole, and at common law might have granted leases for lives or years to any extent and have thereby bound the successors: Com. Dig. Grant (G. 3).

Under the Dominion Lands Act (1907) 7-8 Edw. VII. c. 20, the Crown has power to make leases of grazing, hay and marsh lands, under regulation made by the Governor-General in Council: see s. 33.

Though a lease of timber berths made pursuant to this statute, gives the lessee exclusive possession of the land and creates a valid lease for a year, it seems there is no implied covenant for good right and title to make the lease and for quiet enjoyment: *Bulmer v. The Queen* (1894) 23 S. C. R. 488; 3 Ex. Ct. 184.

The Crown by letters patent under the great seal granted a lease or license of occupation of certain land for 21 years, unless the same should be sooner required by the Crown, on notice of which the grant was to cease and be void. It was held on an information for intrusion after notice and refusal to give up possession, that as the removal of the lessee was not founded on any breach of condition or forfeiture, no inquest of office was necessary to terminate the right: *The Queen v. Herbert* (1853) 7 N. B. R. 427.

In Ontario no inquest of office is necessary in the case of escheated lands, or lands forfeited for any cause: R. S. O. 1914, c. 104; *Att.-Gen. v. O'Reilly* (1881) 6 A. R. 576; 5 S. C. R. 538; 8 A. C. 767. Under the Criminal Code, there is no attainder and no forfeiture of real estate on a conviction for treason or any indictable offence. See p. 29, *ante*.

As to escheats see R. S. M. 1913, c. 62; R. S. N. S. 1900, c. 175 (1919) c. 52; R. S. B. C. 1911, c. 76; C. S. N. B. 1903, c. 158

Dominion Lands Act, 7-8 Edw. VII. c. 20, repealing: R. S. C. 1906, c. 55. See *Re "The Land Titles Act"* (1913) 4 W. W. R. 677 [Alta.—Beck, J.].

Application of the Act: See s. 3.

Timber berths are now given under license, not lease, Compare c. 55, s. 170, with 1908, c. 20, s. 51, and 1918, c. 19, s. 16.

Land unsuitable for cultivation, without irrigation or drainage, may be leased in the same way [s. 34 as amended in 1918, c. 19, s. 14].

Mineral lands may also be leased, s. 37 as amended in 1914, c. 27, s. 8; also lands containing quarriable stone, s. 38 amended 1914, c. 27, s. 9. Section 43 defines the rights of the lessees in such case, and s. 99 provides a summary procedure for forfeiture.

The Public Lands Grants Act, R. S. C. 1906, c. 57, s. 4, permits the Governor-in-Council to authorize the sale or lease of public lands not required for public purposes, and for the sale or lease of which there is no other provision in the law, and to make regulations in respect of rental for the same.

Section 5 specifies that the leases may be executed on behalf of the Crown by the Minister of the department having the control and management of such lands.

See also the Railway Belt Act [B.C.] R. S. C. 1906, c. 59, s. 5 and 1918, c. 40, s. 1.

As to Indian Lands: See R. S. C. 1906, c. 81, ss. 47, 48, 52 to 57, 61-63.

Ordnance and Admiralty Lands: R. S. C. 1906, c. 58, ss. 4, 6.

And see the Land Titles Act, R. S. C. 1906, c. 110, applying to the Territories.

### *Provincial Statutes.*

Ontario: R. S. 1914, c. 28, the Public Lands Act.

British Columbia: R. S. 1911, c. 129, ss. 71 to 79 [Land Act]

New Brunswick: C. S. 1903, c. 28 [long leases of Crown timber lands], c. 30 [mining leases] ss. 13-15, (execution) 66, 102 to 108-117 (forfeiture), 125 *et seq.*

Nova Scotia: R. S. 1900, c. 24, ss. 13, 14, 30 (1) [Timber Lands]: 20 [signature by Lieut.-Gov. and Provincial Secretary]. Crown Lands Act: 1918-19, c. 36, s. 1, adding s. 37A to 1910, c. 4, and see 1919, c. 78; 1915, c. 84.

Saskatchewan: See (1912-13) 2nd Sess. 2-3 Geo. V. c. 47.

### *Drunkards.*

One who becomes a party to a lease when in such a state of intoxication as not to know what he is doing will not be bound by it: *Gore v. Gibson* (1845) 13 M. & W. 623. But the contract is voidable only, and may be ratified when the party becomes sober: *Matthews v. Baxter* (1873) L. R. 8 Ex. 132; 42 L. J. (Ex.) 73; *Bawlf Grain Co. v. Ross* (1917) 55 S. C. R. 232; [1917] 3 W. W. R. 373 [Alta.].

### *Statutory Provisions.*

In several of the provinces there are special provisions in regard to habitual drunkards.

In Manitoba a drunkard has no power to dispose of any real or personal estate: R. S. M. (1913) c. 120, s. 34.

In Ontario see R. S. O. 1914, c. 68, s. 37 (1), extending the provisions of the Lunacy Act to persons, not lunatic, but incapable of managing their own affairs through mental infirmity arising by reason of habitual drunkenness or the use of drugs.

British Columbia: By R. S. 1911, c. 70 [The Drunkards Act], s. 2. Any person who is proven to be an

habitual drunkard shall not have the right to manage or dispose of any real or personal estate.

Contracts to be void [13] Administrator of Estate [14].

Manitoba: R. S. 1913, c. 120, s. 34, is similar to the B. C. Act [The Lunacy Act—Drunkards]. The contracts of such a person are void [s. 42], and a curator may be appointed [s. 43].

New Brunswick: C. S. 1903, c. 112, ss. 267 *et seq.* [Supreme Court in Equity Act], and see 1906, c. 37, s. 8 (part).

Nova Scotia: R. S. 1900, c. 126 [Inebriates—Guardianship and Care of] s.-s. 2; s. 11 [Adult son may be appointed guardian] s. 12, the effect of interdiction is to be the same as the appointment of a guardian under the Lunacy Act; as to (d) management of the estate, (e) sale of real property.

### *Elegit Creditors.*

An elegit creditor of the lessor becomes assignee of the reversion and may without any attornment sue or distrain for the rent which becomes due after inquisition: *Ramsbottom v. Buckhurst* (1814) 2 M. & S. 565; *Lloyd v. Davies* (1848) 2 Exch. 103.

### *Equitable Owner.*

See *Hessey v. Quinn* [noted p. 41, Executors and Administrators, *infra*].

A vendor by agreement for sale—under which the purchaser has the right to possession—who leases the land for a year to a third party makes his contract impossible of performance, and his purchaser may rescind: *Larson v. Rasmussen* (1913) 4 W. W. R. 53 [Alta.—Walsh, J.].

In *Tytler v. Genung* (1914) 24 M. R. 148 [C.A.], it was held, Richards, J.A., dissenting, that a vendor under agreement for sale, who had taken possession of the land under a judgment of the Court for possession, and leased the land for one crop season to prevent it deteriorating was not thereby estopped from suing for

payment of arrears, specific performance and cancellation.

*Canadian Pacific Railway Co. v. Fuller* [1917] 3 W. R. 90; 36 D. L. R. 404 [Alta.—App. Div.], was the case of a lease made by the purchaser under such an agreement, who went into possession. The agreement provided for cancellation on default or an alternative right to the vendor, to enter and lease, etc., the lands. It was held that the purchaser could assign his interest in the lease only subject to the right of the vendor.

### *Executors and Administrators.*

See also "Settled Estates," p. 55, *post*.

Executors and administrators may dispose absolutely of terms of years vested in them in right of their testators or intestates, or may lease the same for any fewer number of years; and the rent reserved on such leases shall be assets in their hands, and go in a course of administration: Bac. Abr. tit. Leases (I. 7).

But the granting of a lease must be shown to be the best way of administering the estate: *Oceanic Steam Navigation Co. v. Sutherland* (1880) 16 Ch. D. 236 [C.A.].

An executor may demise before probate, because his appointment, estate and power are derived from the will of which the probate is merely evidence: *Roe d. Bendall v. Summersett* (1770) 2 W. Blac. 692; Roll. Abr. tit. Executors (A.).

But an administrator cannot make a lease until he has obtained letters of administration: *Wankford v. Wankford* (1703) 1 Salk. 301.

In *Hessey v. Quinn* (1909) 18 O. L. R. 487; 13 O. W. R. 907 [Riddell, J.], the Court had to consider a lease made by two out of three executors. The property in question was devised to the three to hold for the use of the testator's wife for life, with remainder to the children. The wife was one of the two who made the lease. It was urged on their behalf that the lease was void, but the Court did not think it necessary to pass upon the question. Riddell, J., saying (p. 490): "She

is the owner in equity for her life and at least during her life the lease is valid and effective.”

And see *Zimmerman v. Wilson* (1899) 19 Occ. N. 337; *St. Germain v. Reneault* (1909) 12 W. L. R. 169; *Morris v. Cairncross* [noted at p. 67]; *Sproule v. Murray* (1919) 16 O. W. N. 841, and *Re Bull* (1906) 7 O. W. R. 199.

Trustees unless expressly or impliedly restrained by the terms of the trust, possess a general power to lease trust property if the lease does not exceed the quantity of estate vested in them and is reasonable.

A testator gave all his estate, real and personal, to trustees upon trust, to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death to sell and divide the proceeds among his children equally. It was held that this gave the wife the right to lease the farm and deal herself directly with the tenant during her life, and a lease made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, was set aside and possession of the property given to the widow: *Hefferman v. Taylor* (1888) 15 O. R. 670.

A testator made the following devise: “After paying all my just debts and funeral expenses, I devise and bequeath all my property, real and personal, to be equally divided among my children without any distinction whatsoever, reserving to my dear wife so long as she shall remain my widow, the revenue and income to be derived therefrom for her own support and the education and maintenance of my children.” It was held that the widow took an estate in the land during her widowhood, and with one of the executors had a right to lease it for ten years, rent payable to her, and that this lease could not be affected by a mortgage given by the owners of the estate in remainder: *King v. Murray* (1882) 22 N. B. R. 382.

A lease by one trustee is not binding on his co-trustee unless he has adopted it: *Davis v. Lewis* (1885) 8 O. R. 1.

Where two of four trustees of trust property agreed to lease it without the knowledge of the other two to

whom notice of the agreement could not be imputed, and all four joined in resisting an action by the intended lessee for specific performance, it was held that the agreement could not be enforced: *McKelvey v. Rourke* (1869) 15 Gr. 380.

Trustees under a will holding the legal estate in property in trust to maintain themselves and their children, with remainder over to the children and with power to absolutely convey the property and to exclude any child from participating in the remainder, have implied power to make all reasonable leases, and an agreement for a building lease, with provision for compensation to the lessee for improvements at the end of the term, or a renewal, is reasonable and will bind the trust estate, and specific performance of such an agreement will be decreed: *Brooke v. Brown* (1890) 19 O. R. 124.

One of two trustees took a lease from the *cestui que trust*, a married woman, at what was alleged to be an inadequate rental. It did not appear that the latter had any proper advice and the Court set aside the lease, but gave the trustee the option of taking a new lease of the property to be settled by the Master: *Seaton v. Lunney* (1879) 27 Gr. 169.

A trustee in the administration of trust property may take a lease, and if he does he is liable upon its covenants in the same way as if he had the beneficial enjoyment: *White v. Hunt* (1870) L. R. 6 Ex. 32; 40 L. J. (Ex.) 23. The lessor has no remedy against the *cestui que trust*; *Walters v. Northern Coal Co.* (1855) 5 De G. M. & G. 629; 25 L. J. (Ch.) 633; though an account may at his suit be decreed against the latter as equitable lessee of the land: *Wright v. Pitt* (1870) L. R. 12 Eq. 408; 40 L. J. (Ch.) 558.

### *The Statutes.*

Manitoba: R. S. M. 1913, c. 200, ss. 15, 16, 17.

Nova Scotia: (1901) 1 Edw. VII. c. 12.

Saskatchewan: (1918-19) 8-9 Geo. V. c. 2, s. 15, gives the personal representatives power to lease from year

to year while the real property is vested in them, and for longer terms with the approval of the Court.

And see R. S. S. 1909, c. 46, s. 47 *et seq.*, as to the liabilities of trustees in respect of covenants in leases.

### *Guardians.*

*Guardians by nature* are the father, or on his death, the mother of the child until it attains twenty-one years: 2 Steph. Com. (11th ed.) 323. They may perhaps possess the power of leasing at will, but not for a term: *Pigot v. Garnish* (1606) Cro. Eliz. 678-734.

*Guardian for Nurture.* — Where no testamentary guardian is appointed, the father or mother is guardian for nurture until the infant attains the age of fourteen years: 2 Steph. Com. (11th ed.) 323.

A guardian for nurture cannot make any leases for years, either in his own name or in the name of the infant, for he has only the care of the person and the education of the infant, but such guardian, it seems, may make leases at will: Bac. Abr. tit. Leases (I. 9).

A guardian at common law, generally called “a guardian in socage,” could always demise the infant’s lands: *R. v. Sutton* (1835) 3 A. & E. 597-613; *Rex v. Oakley (Inhabitants)* (1809) 10 East 491-4. But a lease made by a guardian in socage becomes void after the heir attains the age of fourteen years: *Doran v. Reed* (1864) 13 U. C. C. P. 393; see *Doe v. Woodworth* (1857) 8 N. B. R. 577.

A guardian having no estate in the land cannot lease his ward’s land in his own name. If he could his lease would determine on his death, or on the ward attaining full age. If a guardian demise by deed, his personal representative only can sue for the rent, and if not by deed the guardian may recover the rent in the name of the infant, but not in his own right as guardian: *Collins v. Martin* (1880) 42 U. C. R. 602; see also *Clarke v. Macdonell* (1890) 20 O. R. 564.



*Statutory Provisions.*

Ontario: R. S. O. 1914, c. 153, s. 5.

Guardians appointed by the Court are in the nature of receivers, and must obtain the sanction of the Court before they can lease: *R. v. Sutton* (1835) 3 A. & E. 597-608.

A guardian to an infant appointed under the R. S. O. c. 153, having under that Act the charge and management of the estate, real and personal, of the infant, has power to lease the lands of the infant during the latter's minority, but not beyond that period: *Clarke v. Macdonell* (1890) 20 O. R. 564, disapproving of *Townsley v. Neil* (1864) 10 Gr. 72; *Switzer v. McMillan* (1875) 23 Gr. 538; see also *Huggins v. Law* (1887) 14 A. R. 383.

The guardian of an infant tenant for life executed a lease for years without the sanction of the Court. During the existence of the lease the infant died. The tenant was then ordered to deliver up possession, and on payment into Court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him on the property, doing no damage to the realty, but the Court refused to allow anything for improvements made upon the premises: *Townsley v. Neil* (*supra*).

*Idiots and Persons Non Compotes Mentis.*

As to the distinction between "idiots" and "lunatics." See 19 Hals. s. 395.

Leases made by idiots or persons *non compotes mentis* are *prima facie* binding, but may be avoided: Co. Lit. 247 (a).

*Statutory Provisions.*

Ontario: R. S. O. 1914, c. 68, s. 37 (1).

In *Hunting v. MacAdam* (1907) 6 W. L. R. 501; 27 Occ. N. 755 [B. C.]—an action to establish the validity of a lease and for relief against forfeiture—the defendant set up that her husband with whom the lease was negotiated, was incompetent to transact business, and that she

was coerced into executing the lease by fears as to the effect of her refusal upon her husband: *Hunter, C.J.*, held—irrespective of these facts—that she had estopped herself from setting up this defence by handing over the lease after a conference with her solicitor.

### *Indians.*

See *Tait v. Snetzinger* (1909) 14 O. W. R. 1029, the Indian Act, R. S. C. 1906, c. 81, and *Atkins v. Davis* (1917) 38 O. L. R. 548; 34 D. L. R. 69.

### *Infants.*

#### *Leases by Infants.*

A lease by an infant may be avoided or confirmed by the infant after coming of age. Acts *in pais* may amount to a confirmation, but they should be distinct and unequivocal, and show a clear intention to confirm. The mere omission to disaffirm such deed, without any circumstances from which an intention to ratify it may be inferred, will not amount to a confirmation: *Seeley v. Charlton* (1881) 21 N. B. R. 119; 18 Hals. s. 789; 17 Hals. s. 237.

Unless it is necessarily to his prejudice, *e.g.*, when no rent is reserved [17 Hals. s. 136, 18 Hals. 237], a lease made by an infant is not void, but voidable only: *Seeley v. Charlton* (*supra*), notwithstanding that the rent reserved is not the best obtainable. And such lease is not avoided by a lease of the same lands made to a third party by the infant upon his attaining full age. To avoid such lease, where the lessee is in possession, some act of notoriety, such as ejectment, entry or demand of possession, is requisite after the lessor attains full age: *Slator v. Brady* (1863) 14 Ir. C. L. R. 61. If the lease be for the benefit of the infant it is binding upon him: *Ketsey's Case* (1613) Cro. Jac. 320; *Maddon d. Baker v. White* (1787) 2 T. R. 159; 2 Esp. 530. The lease of an infant to be good must be his own personal act: *Doe d. Thomas v. Roberts* (1847) 16 M. & W. 778.

As to ratification otherwise than by acts *in pais*, being required to be in writing, see the statutes noted below.

An agreement for a lease by an infant will not be enforced: *Lumley v. Ravenscroft* [1895] 1 Q. B. 683.

In *Monro v. Toronto R. W. Co.* (1902) 4 O. L. R. 36 [Div. Ct.] it was held that an infant (tenant in common) lessor who repudiated upon coming of age was entitled to an account of *mesne profits* and a partition between him and the lessee for the residue of the term—but see (1903) 5 O. L. R. 483; 23 Occ. N. 165, and (1905) 9 O. L. R. 299.

The lease of an infant is valid during infancy. An infant cannot, during infancy, avoid a lease by him reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose: *Lipsett v. Perdue* (1889) 18 O. R. 575, following *Slator v. Brady* (1863) 14 Ir. C. L. R. 61-342; *Hartshorn v. Early* (1869) 19 U. C. C. P. 139.

### *Statutory Provisions.*

By the Ontario Infants' Act, R. S. O. 1914, c. 153, s. 5.—(1), “where an infant is seised, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the Supreme Court is of opinion that a . . . sale, mortgage, lease or other disposition of the same, or of a part thereof, or of any timber not being ornamental growing thereon, is necessary or proper for the maintenance or education of the infant, or that for any cause, his interest requires or will be substantially promoted by any disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the Court or of one of its officers, or by the guardian of the infant or by a person appointed for the purpose, in such manner and with such restrictions as may be deemed expedient, and may order the infant to convey the estate.

(2) No sale, . . . lease, or other disposition shall be made contrary to the provisions of a will or con-

veyance by which the estate has been devised or granted to the infant or for his use.”

[Origin and History: (1913) 3-4 Geo. V. c. 18, s. 29 (1) (2); (1912) 2 Geo. V. c. 17, s. 31 (2); (1911) 1 Geo. V. c. 35, s. 5 (1) (2); R. S. O. 1897, c. 168, s. 5; R. S. O. 1887, c. 137, s. 3].

### *Similar Legislation.*

Alberta: (1913) 2 Sess. 2 Geo. V. c. 13, s. 10 (1) (2).

British Columbia: see R. S. B. C. 1911 c. 208, s. 51.

By s. 13 [Ont.].—“The application shall be in the name of the infant by his next friend, or guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards unless the Court otherwise directs or allows.”

Alberta: s. 11.

By s. 14 [Ont.].—“Where it is deemed convenient the Court may direct some other person in the place of the infant to convey the estate.”

Alberta: s. 12.

By s. 15 [Ont.].—“Every such conveyance, whether executed by the infant or by a person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time.”

Alberta: s. 13.

Alberta: 1913 (2nd Sess.) c. 13, ss. 10 *et seq.*, corresponds largely with the Ontario Act.

British Columbia: R. S. 1911, c. 107, s. 39: taken from 37-38 Vict. c. 62, s. 1 [Imp.] “all contracts . . . entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities) shall be null and void.”

Section 40: taken from 37-38 Vict. c. 62, s. 2 [Imp.].—“No action is to be brought on the ratification of an infant’s contract whether or not there has been a new consideration for it.”

Sections 46 to 58.—Leases with leave of Supreme Court.

These sections are largely taken from 11 Geo. IV. and 1 Wm. IV. [Imp.] c. 65, ss. 12, 14, 15 to 18, 20 21 (pt.), 26, 31, 32, 35 and 10 & 11 Wm. III [Imp.] c. 16, s. 1.

Manitoba: R. S. 1913, c. 94, ss. 37 to 46; 1919, c. 45, s. 1.

New Brunswick: C. S. 1903, c. 112, ss. 186 to 198 [Supreme Court in Equity Act].

Nova Scotia: R. S. 1900, c. 115, s. 6 (1) [Guardians and Wards].

The provisions as to renewal and surrender of leases are set out at pp. 980 and 693, *post*.

Reference should also be made to "Settled Estates": see p. 55, and see the Title "Guardians," p. 44, *ante*.

As to practice see Holmested, pp. 1265 *et seq*.

### *Leases to Infants.*

Leases to infants are not absolutely void, but voidable by them upon attaining their majority, and if the rent becomes due after the infant comes of age, and he has not repudiated the lease, he will be liable for the rent where it is not shown to the Court that the rent is greater than the value of the land: *Ketsey's Case* (1613) Cro. Jac. 320; 17 Hals. s. 264; *Baylis v. Dineley* (1815) 3 M. & S. 477, and even if the lease be disadvantageous to the infant he is liable if he does not disclaim on attaining full age: *North West Railway Co. v. McMichael* (1850) 5 Exch. 114; 7 Encyc. Laws of Eng. 162, 163.

An infant must elect to avoid a lease within a reasonable time after he attains full age: *Edwards v. Carter* [1893] A. C. 360; and four months' acquiescence after majority would be evidence of a ratification: *Holmes v. Blogg* (1818) 8 Taunt. 35; *Sturgeon v. Starr* (1911) 17 W. L. R. 402; see also *Foley v. Canadian Permanent Loan & Savings Co.* (1883) 4 O. R. 38. If there be an election to annul the lease, the infant cannot recover the

consideration paid for it even where he received no benefit therefrom: *Holmes v. Blogg (supra)*.

Even during infancy he may be liable for the use and occupation of necessary lodgings suitable to his estate and degree: *Hands v. Slaney* (1800) 8 T. R. 578. Where an infant rented a house and exercised his trade as a barber therein, it was held that it was properly left to the jury to decide whether the house was a necessary: *Lowe v. Griffiths* (1835) 1 Scott 458. But it would appear that he is not liable for the rent of a house in which he carries on some trade or manual employment: *Id.*

An infant having obtained a lease of a furnished house on an implied representation that he was of full age, it was held that the lease must be declared void and the possession given up, and that the defendant should be restrained by injunction from parting with the furniture, but that he was not liable for use and occupation: *Lempriere v. Lange* (1879) 12 Ch. D. 675; 41 L. T. 378.

If a person jointly interested with an infant in a lease obtain a renewal to himself only, he will be treated as a trustee for the infant of his share if the lease prove beneficial; but if it do not prove beneficial, he must take it upon himself: *Ex parte Grace* (1799) 1 B. & P. 376.

And see *Sturgeon v. Starr* (1911) 17 W. L. R. 402.

### *Judgment and Execution Debtors.*

A man cannot, of course, make a valid lease if his interest has been previously sold under execution: *Sparrow v. Champagne* (1855) 5 U. C. C. P. 394. But if the writ has only been delivered to the sheriff it seems the lease is valid subject to the *fi. fa.*: *Sloan v. Whalen* (1866) 15 U. C. C. P. 319, and may be made good on payment of the debt and costs: *Price v. Varney* (1825) 3 B. & C. 733.

The lessee from an execution debtor has no higher rights than his lessor, and is bound to know when the interest of the latter will cease, and if he sow a crop which he cannot reap before possession given to the purchaser, he cannot hold the land for the purpose of reap-

ing: see *Cochlin v. Massey-Harris* (1915) 8 W. W. R. 286 [Alta.—App. Div.].

After a *fi. fa.* delivered to the sheriff a term of years remains in the debtor until the sheriff has actually assigned it, therefore until such assignment the purchaser of the term cannot make a valid lease of it: *Playfair v. Musgrove* (1845) 14 M. & W. 239; 3 D. & L. 72; *Doe v. Jones* (1842) 9 M. & W. 372; 1 Dowl. N. S. 352.

The question of the effect of executions is considered at pp. 1011, *et seq.*, *post*.

### *Lunatics.*

Generally speaking, a contract made by a lunatic is binding on him, unless the other party knew of his insanity and took some unfair advantage of it; some imposition must be shown: *Brown v. Joddrell* (1827) 1 Moo. & M. 105.

A lease made by a person of unsound mind is not voidable at that person's option, if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. There must be proof of the incapacity and of the other party's knowledge of it: *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599; 61 L. J. (Q. B.) 449; 66 L. T. 556 [C. A.]; *Molton v. Camroux* (1848) 2 Ex. 487, affirmed (1849) 4 Ex. 17; *Beavan v. McDonell* (1854) 9 Ex. 309; 10 Ex. 184; 23 L. J. (Ex.) 94.

Idiots and lunatics may take leases for their benefit: Co. Lit. 2 b.

But use and occupation cannot be maintained on a written agreement entered into by a lunatic to take a house which is unnecessary, if the lessor was aware of it and took advantage of the lunatic's situation: *Dane v. Kirkwall* (Viscountess) (1838) 8 C. & P. 679.

By acquiescence after recovering his mental faculties a lunatic may confirm a lease made when under disability: *Seely v. Charlton* (1881) 21 N. B. R. 119.

There is a right to raise a question of insanity in reference to the validity of a lease: *Hayward v. Thacker* (1870) 31 U. C. R. 427.

And see, generally, *Re Smith* [1918] 2 W. W. R. 540 [Alta.—Walsh, J.].

### *Statutory Provisions.*

Ontario: The Lunacy Act, R. S. O. 1914; c. 68.

The jurisdiction of the Court is declared by s. 3.

Section 16.—Empowers the committee under order of the Court:

(e) To grant leases of minerals forming part of the lunatic's estate.

(f) To surrender and accept a new lease.

(g) To accept a surrender of any lease and to grant a new lease.

(h) To execute any power of leasing vested in a lunatic.

And see, generally, ss. 14 (1), 17, 18, 37 (1).

The testimonium clause in a lease in which a lunatic was lessor was, "In witness whereof the said parties to these presents have hereunto set their hands and seals." A. and B. were the two committees, and A. signed his name against one seal and B. his against another, and the attestation clause was, "Signed, sealed, and delivered by A. and B. in the presence of, etc." It was held that the lease was well executed on behalf of the lunatic, though the ordinary form is in the name of the lunatic by his committee: *Lawrie v. Lees* (1881) 7 A. C. 19; 14 Ch. D. 249.

### *Similar Legislation.*

Alberta: (1907) 7 Edw. VII. c. 7, s. 16 (3), and see (1918) 8 Geo. V. c. 4, s. 3 (2).

British Columbia: R. S. B. C. 1911, c. 148, ss. 23 *et seq.* 35, 36, 37, and (1918) 8 Geo. V. c. 52, ss. 2, 3, 4.

Manitoba: R. S. M. 1913, c. 120, ss. 24-28 [committee may make leases for terms not exceeding three years], and see s. 30.

New Brunswick: C. S. N. B. 1903, c. 112, ss. 228 to 239.

Nova Scotia: R. S. N. S. 1900, c. 125, s. 10.



Saskatchewan: see (1914) 2nd Sess., 4 Geo. V. c. 10; (1918-19) 8-9 Geo. V. c. 58, ss. 17, 18.

### *Married Women.*

Under the former law the husband might make a lease for years of his wife's land, but on his death, before his wife, the term came to an end: *Burns v. McAdam* (1865) 24 U. C. R. 449. The wife could not lease her own land without the concurrence of her husband: *Enrick v. Sullivan* (1866) 25 U. C. R. 105; *Nolan v. Fox* (1866) 15 U. C. C. P. 565.

Although leases are not specially mentioned in the Ontario Married Woman's Property Act, R. S. O. 1914, c. 149, there seems no doubt that in Ontario a married woman has now the same power of leasing as a *feme sole*. The concurrence of the husband is not necessary: *Bryson v. Ontario & Quebec Railway Co.* (1885) 8 O. R. 380; *In re Coulter* (1885) 8 O. R. 536; *In re Konkle* (1887) 14 O. R. 183; *Wylie v. Frampton* (1889) 17 O. R. 515; *Cameron v. Walker* (1890) 19 O. R. 212; *Hartley v. Maycock* (1897) 28 O. R. 509.

### *Similar Legislation.*

Alberta: By the C. O. 47, as to *personal property*, and by (1906) 6 Edw. VII. c. 19, s. 10, as to real property, a married woman has all the rights and is subject to all the liabilities of a *feme sole*.

British Columbia: R. S. B. C. 1911, c. 152, s. 3—applies to real and personal property.

Manitoba: R. S. M. 1913, c. 123, s. 2 (b)—applies to real and personal property; s. 3—existing settlements saved.

New Brunswick: C. S. N. B. 1903, c. 78, s. 3 (1) applies to real and personal property.

Nova Scotia: R. S. N. S. 1900, c. 112, ss. 4-13, applies to real and personal property.

Marriage settlements saved by s. 27, c. 113: Married Woman's Deeds Act.

Saskatchewan. R. S. S. 1909, c. 45 [Married Woman's Property Act] s. 4, permits a married woman to acquire, hold and dispose of any real and personal property, without her husband's consent and as if she were a *feme sole*; and see per Bigelow, J., in *Adolf v. Adolf* [1919] 1 W. W. R. 878 [Sask.], at p. 879, holding there was a tenancy between husband and wife.

A lease for life to husband and wife confers on them an estate by entirety, and as The Married Woman's Property Acts do not affect such an estate; but see *Re Wilson* (1890) 20 O. R. 397; *Thornley v. Thornley* [1893] 2 Ch. 229; a repudiation thereof during coverture would not be binding on the wife, but she might still assert her right thereto after her husband's death. The non-execution by the wife of such a lease, though containing covenants to be performed by her, will not prevent the term from vesting in her, for though not liable on the covenants, she would be liable in debt for rent in respect of the privity of estate: *Britton v. Knight* (1879) 29 U. C. C. P. 567.

In *Johnson v. McLellan* (1871) 21 U. C. C. P. 304, it was held that the receipt of rent by the wife, with the husband's assent, from a tenant of her estate after the expiration of the term, created a tenancy from year to year. This was in 1869, but as she has now the power to lease, the assent of her husband would be immaterial.

### *Personal Representatives.*

See Executors and Administrators.

### *Persons Having no Title.*

See Article 4—Estoppel.

### *Sequestrators and Receivers.*

A sequestrator can with the sanction of the Court lease for any period during which the rents would be less in the aggregate than the amount for which the sequestration issued: *Harris v. Meyers* (1869) 3 Ch. Cham. 89. But a lease by a sequestrator is not good against any one

having a prior incumbrance on the property: *Meyers v. Meyers* (1872) 19 Gr. 541.

See also Holmested, [O.J.A.], pp. 1176 to 1178, and the provisions of the Rules in the various provinces.

Receivers appointed by the Court of Chancery cannot demise without the authority and direction of that Court: *Morris v. Elme* (1790) 1 Ves. Jun. 139. They are bound to obtain the best terms: *Wynne v. Newborough* (1790) 1 Ves. Jun. 164.

But a lease under seal granted by a receiver in a cause reserving rent to the receiver and any future receiver in the cause creates a tenancy by estoppel as between him and the lessee, and he may distrain for the rent when in arrear: *Dancer v. Hastings* (1826) 4 Bing. 2; see *Morton v. Woods* (1869) L. R. 4 Q. B. 293.

So there is a tenancy by estoppel when a tenant attorns to a receiver appointed by the Court: *Hughes v. Hughes* (1790) 1 Ves. Jun. 161; *Ames v. Birkenhead* (1855) 20 Beav. 332; 24 L. J. (Ch.) 540.

See Holmested, pp. 74 to 88; 1022, Ann. Pr. 1919, p. 865, and *Imperial Bank v. Twyford* (1905) 1 W. L. R. 157.

A widow entitled to dower commenced an action against a tenant to whom, without express authority, the property had been leased by a receiver. It was held that she was not at liberty to proceed with such action without leave of the Court: *Coleman v. Glanville* (1871) 18 Gr. 42.

### *Settled Estates.*

A settled estate is defined as "land and all estates or interests in land which are the subjects of a settlement": R. S. O. 1914, c. 74, s. 2 (e), and settlement is defined in s.s. (f). See also *National Trust Co. v. Shore* (1908) 16 O. L. R. 177; 11 O. W. R. 228 [Meredith, C.J.C.P.] and *In re Cornell* (1905) 9 O. L. R. 128 [Boyd, C.]: *The Settled Estates Act* (Ontario): R. S. O. 1914, c. 74, s. 3 (1).

By this Act [which is taken from the Imperial Act: see p. 66, *post*], "the Court, if it deems it proper and con-

sistent with a due regard for the interests of all persons entitled under the settlement, and subject to the provisions and restrictions of this Act, may authorize leases of any settled estate, or of any rights or privileges over or affecting any settled estate, for any purpose whatsoever, the following conditions being observed”:

I. Every such lease shall be made to take effect in possession at or within one year after the making thereof, and be for such term of years as the Court shall direct, where the Court is satisfied that it is beneficial to the inheritance to grant such a lease [3 (1) (a)].

II. The best rent must be reserved that can reasonably be obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine, and shall be incident to the immediate reversion [3 (1) (b)]. And see the exception—allowing nominal rents in certain cases to get over the difficulty which arose in *Cust v. Middleton* (1861) 3 DeG. F. & J. 33, where the Court held that the 19 & 20 Vict. c. 120, did not authorize a building lease at a pepper-corn rent.

III. If the lease be of minerals, a certain portion of the rent must be set aside and invested [3 (1) (c)].

IV. No such lease shall authorize the cutting of any timber or the felling of any trees, except in the ordinary course of husbandry, or so far as shall in the judgment of the Court be necessary, or be made without impeachment of waste [3 (1) (d)].

V. Every such lease shall be by deed and shall be in duplicate, and executed by the lessor and lessee, and shall be subject to the statutory right of re-entry for non-payment of rent contained in the Landlord and Tenant Act (see p. 163, *post*) [3 (1) (e)].

Section 3 (2) provides that such a lease may contain an agreement for a renewal.

Under s. 4 the lease may contain such covenants as the Court shall deem expedient with reference to the special circumstances of the demise.

After the completion of any lease purporting to be in pursuance of the Act, the same shall not be invalidated on the ground that the Court was not thereby empowered to authorize the same: s. 30, and under s. 31 an order of the Court is conclusive as against a purchaser, mortgagee or lessee.

By s. 4. "Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the Court deems expedient with reference to the special circumstances of the demise." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 5.

By s. 5. "The power to authorize leases conferred by this Act shall authorize leases either of the whole or any part of the settled estate, and may be exercised from time to time." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 6.

By s. 6. "A lease whether granted in pursuance of this Act, or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorize leases conferred by this Act shall authorize a new lease of the whole or any part of the hereditaments comprised in any surrendered lease." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 7.

By s. 7. "The power to authorize leases conferred by this Act shall extend to authorize preliminary contracts to grant such leases, and any of the terms of such contracts may be varied in the leases." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 8.

By s. 8. "The power to authorize leases conferred by this Act may be exercised by the Court, either by approving of a particular lease or by ordering that the power of leasing in conformity with the provisions of this Act shall be vested in trustees in manner hereinafter mentioned." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 10.

By s. 9. "Where application is made to the Court either to approve of a particular lease, or to vest any power of leasing in trustees, the Court shall require the applicant to produce such evidence as it deems sufficient

to enable it to ascertain the nature, value and circumstances of the estate and the terms and conditions on which leases thereof ought to be authorized." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 11.

By s. 10. "Where a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person shall execute the same as lessor; and the lease or contract executed by such person shall take effect in all respects as if he had been at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterward settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court directs." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 12.

By s. 11.—"Where the Court deems it expedient that any general power of leasing any settled estates conformably to this Act should be vested in trustees, it may by order, vest any such power accordingly, either in the existing trustees of the settlement or in any other person or persons, and such power, when exercised by such trustees, shall take effect in all respects as if the powers so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court may impose any conditions as to consents or otherwise on the exercise of such power, and may also authorize the insertion of provisions in any such order for the appointment of new trustees from time to time, for the purpose of exercising such power of leasing." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 13.

By s. 12. "In any order under this Act for vesting any power of leasing in any trustees or other person or persons, no conditions shall be inserted requiring that the lease thereby authorized shall be submitted to or be settled by the Court, or be made conformable with a model lease, unless the person applying for the order desires to have any such condition inserted, or it appears

to the Court that there is some special reason for the insertion of such a condition." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 14.

By s. 13. "In any orders (whether under this Act or under any other Act) in which any such condition shall have been inserted, any person interested may apply to the Court to alter such order by striking out such condition, and the Court may alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but the Court may decline to act under this provision in any case in which it appears to the Court that for any special reason such a condition is necessary or expedient." Taken from Imp. Act 40 and 41 Vict. c. 18, s. 15.

### *Summary Legislation.*

Alberta: (1919) 9 Edw. V. c. 3, s. 25.

British Columbia: R. S. B. C. 1911, c. 208, ss. 4 to 9 [taken from [Imp.] 40-41 Vict. c. 18, ss. 3, 4, 5 and 8]; ss. 10 to 16 (a) taken from [Imp.] 40-41 Vict. c. 18, ss. 10 to 16.

### *Trustees.*

Trustees possess a general power to lease trust property if the lease does not exceed the quantity of estate vested in them and is reasonable.

### *Unincorporated Societies.*

The executive committee of a voluntary unincorporated association (an athletic club) arranged with P. to lease premises owned by him for the use of the club. The chairman of the committee signed the lease under seal. The rent fell into arrears and P. sued the members of the committee for the rent. No evidence was given at the trial as to whether P. knew of the position of the association when he made the lease. Boyd, C., gave judgment against the defendants and said, at p. 510: "The whole body of members initiating and approving of this lease might have been made liable (as it now appears to

me), but this does not relieve from liability the members of the executive committee who have been sued. Judgment against them and payment by them would put them in the way of getting proper contribution from those others who are liable and who have not been sued. There is no defence by way of abatement for non-joinder of defendants, and there is no technical difficulty in giving judgment against those now before the Court": *Pears v. Stormont* (1911) 24 O. L. R. 508; 20 O. W. R. 23; 3 O. W. N. 56 [Boyd, C.].

It would seem from a consideration of *Overton v. Hewitt* (1886) 3 Times L. R. 246, and the unreported case cited in the foot note at p. 247 of *Jones v. Hope*, that if it had appeared that the landlord's transaction was one with "the club" only the person executing the lease would be liable for the rent. Boyd, C., held, however, that it was "not to be inferred . . . from any of the circumstances that P. looked to the abstract entity—the unincorporated association—instead of to the active members who acted in obtaining the lease."

Any one authorizing the lease is liable: *Steele v. Gourlay* (1886) 3 T. L. R. 118; (1887) 3 T. L. R. 772.

Members of a club as such are not liable for its obligations: *Wise v. Perpetual Trustee Co.* [1903] A. C. 139, but may make themselves so: *Harper v. Granville Smith* (1891) 7 T. L. R. 284; *Draper v. Earl Manvers* (1892) 9 T. L. R. 73.

A lease was made between an unincorporated society represented by three persons, naming them as tenants and signed by them as president and secretary. It was held that the lease should be read against the landlord as one to the three persons named, as he knew he was dealing with an unincorporated society: *Trudeau v. Pepin* (1904) 3 O. W. R. 779 [Div. Ct.]. Reference might also be made to *Gowans Kent v. Assiniboia Club* (1915) 33 W. L. R. 267; 9 W. W. R. 936; 8 Sask. L. R. 344; 25 D. L. R. 695 [Elwood, J.].



*And Seised or Possessed of Lands and Tenements.*

These notes are confined in their application to corporeal hereditaments: see p. 7, *ante*.

Tenant in Fee Simple, p. 61.

Joint Tenants, p. 61.

Tenants in Common, p. 61.

Tenant in Tail, p. 64.

Tenant in Life, p. 64.

Tenant *pur autre vie*, p. 72.

Tenants by the Curtesy or in Dower, p. 73.

Tenant for Years, p. 74.

Tenant from Year to Year, p. 74.

Tenant at Will, p. 74.

Tenant at Sufferance, p. 74.

Estates in land are estates of freehold and estates less than freehold or real estates and chattels real. As land is considered to be the subject of tenure and not of absolute ownership estates of freehold are spoken of as freehold tenancies. There are two such tenancies: (1) tenancy (*a*) in fee simple, or (*b*) fee tail; (2) tenancy for life (*a*) of the tenant, or (*b*) *pur autre vie*.

Estates less than freehold or chattels real are usually spoken of as leasehold tenancies. They are tenancies (*a*) for a term of years; (*b*) from year to year; (*c*) at will; and (*d*) at sufferance.

These tenancies are defined and discussed in Chapter IV., p. 190, *post*.

*Tenant in Fee Simple.*

A tenant in fee simple may make leases without limit or restriction for any number of lives or years, and upon such terms and conditions as he may think fit: Com. Dig. Estates by Grant (G. 2).

*Joint Tenants.*

See Tenants in Common.

*Tenants in Common.*

Joint tenants and tenants in common may, according to the interests they have, join or sever in making leases,

and such leases shall bind whether made to commence *in presenti* or *in futuro*: Co. 186 (a); Com. Dig. Leases (I. 5); Bro. Abr. Grant 154; Bac. Abr. tit. Joint Tenants (H. 1).

If joint tenants join in a lease this shall be but one lease, and they all make but one lessor; but if tenants in common join in a lease it shall be several leases of their several interests: 8 Andr. 16; *Jurdain v. Steere* (1605) Cro. Jac. 83; Com. Dig. tit. Estates (G. 6).

Tenants in common cannot make a joint lease of the whole of their estate: *Burne v. Cambridge* (1836) 1 Moo. & R. 539. There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share and confirmation by each of his companions: *Thompson v. Hakewill* (1865) 19 C. B. N. S. 713; 35 L. J. (C.P.) 18. Each may lease his share to a stranger: Co. Lit. 199 (a); and see *Jacob v. Seward* (1872) L. R. 5 H. L. 464. Where joint tenants grant a lease, the interest of the lessee continues notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent: *Henstead's Case* (1594) 5 Co. R. 10b; *Doe d. Aslin v. Summersett* (1830) 1 B. & Ad. 135. In the case of a lease at will, the death of one of the lessors does not put an end to the will, for all survives to the other: *Henstead's Case, supra*. If one of two joint tenants make a lease of the whole his moiety only will pass, and the same result will follow if both purport to lease and only one execute the deed: Co. Lit. 186a; *Bellingham v. Alsop* (1605) Cro. Jac. 52. One joint tenant may let his part for years or at will to his companion, with the usual incidents of a reversion and right to distrain: *Cowper v. Fletcher* (1865) 6 B. & S. 464; 34 L. J. (Q.B.) 187; Com. Dig. tit. Leases (I. 5). Such lease extinguishes the jointure while it exists: Co. Lit. 186 (a), and if there be three or more joint tenants the lessee would hold the share demised to him as tenant in common with the others; *Jurdain v. Steere* (1605) Cro. Jac. 83. One tenant in common has no right to lease for a purpose which will destroy the property, and where one

such tenant leased part of the property for a stone quarry, the other was held entitled to an injunction against further quarrying, for this was not a legitimate enjoyment of the property: *Goodenow v. Farquhar* (1872) 19 Gr. 614; *Dougall v. Foster* (1853) 4 Gr. 319.

If, after the expiration of a lease by one joint tenant to the other, the tenant holds over, the same consequences must be taken to follow as would arise in the case of a lease between strangers. The lessor would have a right to treat the defendant as a tenant at sufferance, and to sue him for use and occupation: *Leigh v. Dickeson* (1884) 15 Q. B. D. [C.A.]; 54 L. J. (Q.B.) 18.

By R. S. O. 1914, c. 109, s. 13 (1).—"Where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons *other than executors or trustees in fee simple*, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants."

### *Similar Legislation.*

Alberta: C.O. cap. 37.

British Columbia: R. S. B. C. 1911, c. 127, s. 52.

Manitoba: R. S. M. 1913, c. 106, s. 2.

New Brunswick: see C. S. N. B. 1903, c. 155.

Nova Scotia: R. S. N. S. 1900, c. 136, s. 4.

### *Tenants by Entireties.*

By R. S. O. 1914, c. 109, s. 13 (2), the above section shall apply notwithstanding that one of such persons is the wife of another of them.

Where land is transferred to a man and his wife they do not take as tenants by entireties unless it is so expressed in the transfer: 6 Edw. VII. c. 19, s. 7 [Alta.].

See also C. S. N. B. 1903, c. 152, s. 22.

*Tenants in Tail.*

Subject to the statutory provisions noted under, when a tenant in tail makes a lease the issue in tail may affirm or avoid it as they think fit: Bac. Abr. tit. Leases D.

An acceptance of rent will, as in other cases, confirm the lease: *Doe d. Southouse v. Jenkins* (1829) 5 Bing. 469; *Doe d. Phillips v. Rollings* (1847) 4 C. B. 188; Cruise Dig. tit. 11, c. 2, s. 8.

Where a tenant in tail makes a lease for lives and dies without issue, the lease is absolutely determined by his death, so that no acceptance of rent by him in remainder or reversion can make it good. The acceptance by the remainderman of a yearly nominal rent is not a confirmation of the lease, especially where the party disclaims to hold as his tenant: *Graham v. Newton* (1846) 3 U. C. R. 249.

Tenancies in tail are abolished in:—

Alberta: (1906) 6 Edw. VII. c. 19, s. 9.

New Brunswick: C. S. N. B. 1903, c. 154 [same as N.S.].

Nova Scotia: R. S. N. S. 1900, c. 136, s. 5 [declared fee simple; and see *Re Simpson* (1863) 5 N. S. R. 317-745; *McKenzie v. McKenzie* (1865) 6 N. S. R. 178].

Saskatchewan: R. S. S. 1909, c. 41, s. 6; (1906) 6 Edw. VII. c. 19, s. 9.

*The Other Statutes.*

In the other provinces the following legislation effects estates tail:—

British Columbia: R. S. B. C. 1911, c. 77; see particularly s. 26.

Manitoba: R. S. M. 1913, c. 63; see s. 2.

Ontario: R. S. O. 1914, c. 113.

*Tenant for Life.*

A lease made by the owner of a life estate in lands is terminated by the death of the lessor before the expiry of the term granted: *Atkinson v. Farrell* (1912) 27 O. L. R. 204; 4 O. W. N. 73; 8 D. L. R. 582 [Div. Ct.].

If a lease be made for a longer term than the estate of the lessor warrants, it will generally operate as a valid demise during so much of the term as he has power to grant. Thus a lease by a tenant for life is good during his life, though it purport to extend beyond the duration of any human life: *Bragg v. Wiseman* (1614) 1 Brownl. 22. So if a tenant for life empowered to make leases for long terms execute a lease not in strict accordance with the power, it will be good during so much of the term as may elapse during the lessor's life: *Yellowly v. Gower* (1855) 11 Exch. 274; 24 L. J. (Ex.) 289; *How v. Greek* (1864) 3 H. & C. 391; 34 L. J. (Ex.) 4.

A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term, but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate: *Moore v. Clench* (1876) 1 Ch. D. 447; 45 L. J. (Ch.) 80; 34 L. T. 13; see also *Mostyn v. Lancaster*, *Taylor v. Mostyn* (1883) 23 Ch. D. 583; 52 L. J. (Ch.) 848.

In *Wakefield v. Wakefield* (1900) 32 O. R. 36; 22 Occ. N. 255 [Div. Ct.], a widow entitled to the use and enjoyment of her husband's property for her life was held to have renewed a lease of property occupied by him in his lifetime for the benefit of the estate.

A devisee for life with a power to sell has, by implication, a power to lease also, and whether such power exist or not, the lessee entering and paying rent is estopped from contending that under the provisions of the will there was no power to lease: *Knapp v. King* (1874) 15 N. B. R. 309; *Brooke v. Brown* (1890) 19 O. R. 124.

Unless made under the provisions of the statute referred to below, or under an express power, it is void against the remainderman and cannot be confirmed by acceptance of rent: *Doe d. Martin v. Watts* (1797) 7 T. R. 83.

See *Palmer v. Palmer* [1919] 3 W. W. R. 1028 [B.C.—Murphy, J.].

By the Ontario Settled Estates Act, R. S. O. 1914, c. 74, s. 33 [see pp. 55, *et seq.*, *ante*], provision is made for leases by tenants for life, etc.

These provisions are founded on the English Settled Estates Act (1856) 19 & 20 Vict. c. 120, as re-enacted and amended by the Act (1877) 40 & 41 Vict. c. 18, and the Settled Land Act (1882) 45 & 46 Vict. c. 38. The Ontario Act was recast in its present form in 1913, by 3-4 Geo. V. c. 20.

“33.—(1) The following persons, unless the settlement contains an express declaration that it shall not be lawful for them to make the demise, may from time to time and without any application to the Court, except as hereinafter mentioned, demise the settled estate or any part thereof for any term, not exceeding 21 years, to take effect in possession at or within one year next after the making thereof:

- (a) a person entitled to the possession or to the receipt of the rents and profits of any settled estate for an estate for life or for a term of years determinable with any life or lives or for any greater estate not holding merely under a lease at a rent;
- (b) a tenant in tail, including a tenant in tail who is by statute restrained from barring or defeating his entail and although the reversion is in the Crown and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such tenant in tail where the land in respect of which he is so restrained was purchased with money provided by any legislation in consideration of public services;
- (c) a tenant in fee simple with an executory limitation, gift or disposition over on failure of his issue or in any other event;
- (d) a person entitled to a base fee, although the reversion is in the Crown and so that the exercise by him of his powers under this Act shall bind the Crown;

- (e) a tenant for years determinable on life not holding merely under a lease at a rent;
- (f) a tenant for the life of another not holding merely under a lease at rent;
- (g) a tenant for his own or any other life or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift or disposition over, or is subject to a trust for accumulation of income for payment of debts or any other purpose;
- (h) a tenant in tail after possibility of issue extinct;
- (i) a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life whether subject to expenses of management or not, or until sale of the land or until forfeiture of his interest therein on bankruptcy or other event;

(2) The powers conferred by the next preceding subsection may be exercised by a person entitled to the possession or to the receipt of the rents and profits of unsettled land as tenant by the curtesy or tenant in dower."

In *Morris v. Cairncross* (1907) 14 O. L. R. 544 [Div. Ct.], decided before s. 33 (1) (i), was passed, the opinion was expressed that s. 42, as it then stood, permitted a lease, such as is now in terms provided for by s.-s. (i).

An estate for widowhood is an estate for life within the meaning of this section [then s. 42]: *National Trust Co. v. Shore* (1908) 16 O. L. R. 177; 11 O. W. R. 228 [Meredith, C.J.C.P.]: *Re Carne's Settled Estates* [1898] 1 Ch. 324.

"(3) Any of the persons empowered by s.-s. 1 and 2 to make a demise may also make:—

- (a) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predeces-

sor, would have been binding on the successors in title; and

(b) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled estate; and

(c) a lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Act, or otherwise as the case may require."

[3-4 Geo. V. c. 20, s. 33 (3); R. S. O. 1897, c. 71, s. 42 (2)].

"(4) Where two or more persons are under the same settlement or otherwise entitled in possession to concurrent estates for life, or are concurrently entitled to the possession or receipts of the rents and profits as in sub-section 1 mentioned, they shall, for the purposes of this section, act concurrently."

[3-4 Geo. V. c. 20, s. 33 (4); R. S. O. 1897, c. 71, s. 42 (4); 58 Vict. c. 20, s. 42].

"(5) Every demise made under this section shall be by deed in duplicate, and for the best rent that can reasonably be obtained, which rent shall be incident to the immediate reversion, and shall be made payable half-yearly, or oftener."

[R. S. O. 1897, c. 71, s. 42 (1) part, and 42 (3)].

See *Morris v. Cairncross* (1907) 14 O. L. R. 544 [Div. Ct.], at p. 554.

"(6) Such demise shall not be made without impeachment of waste, and shall not authorize the cutting of any timber or felling of any trees, except in the ordinary course of husbandry, and shall contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and shall be subject to the statutory right of re-entry for non-payment of rent contained in the Landlord and Tenant Act."



[R. S. O. 1897, c. 42 (1) part].

See *Morris v. Cairncross* (1907) 14 O. L. R. 544, discussed at p. 627 [Division Ct.].

“34.—(1) Every demise of a settled estate authorized by the next preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to his estate under or by virtue of the same settlement.”

[R. S. O. 1897, c. 71, s. 43 (part)].

(2) Every demise of unsettled land by a tenant by the curtesy or by a tenant in dower shall be valid against the person granting the same and all other persons entitled to an estate subsequent to the estate of such tenant.”

[R. S. O. 1897, c. 71, s. 43 (part)].

#### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 208, ss. 48 *et seq.*

#### *Registration.*

Section 32 of R. S. O. 1897, c. 71, as to registration—see *National Trust Co. v. Shore* (1908) 16 O. L. R. 177; 11 O. W. R. 228—was omitted as unnecessary in 1913: See 3-4 Geo. V. c. 20.

#### *Defects in Leases made Under Power.*

The Ontario Landlord and Tenant Act, R. S. O. (1914) c. 155, provides:—

“11. Where, in the intended exercise of any power of leasing, whether derived under a statute, or under any instrument lawfully creating such power, a lease has been, or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to

the land comprised in such lease, such lease, in case the same has been made in good faith, and the lessee named therein, his heirs, executors, administrators or assigns, have entered thereunder, shall be considered a contract for a grant, at the request of the lessee, his heirs, executors, administrators or assigns of a valid lease under such power, to the like purport and effect as such invalid lease save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound by such contract. But no lessee under any such invalid lease, his heirs, executors, administrators or assigns, shall be entitled by virtue of any such contract, to obtain any variation of such lease, where the persons who have been bound by such contract are willing to confirm such lease without variation.

12. Where, upon or before the acceptance of rent, under any such invalid lease, any receipt, memorandum or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

13. Where, during the continuance of the possession taken under any such invalid lease, the person for the time being entitled, subject to such possession, to the land comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators or any person who would have been bound by the lease if the same had been valid, upon the request of the person so able to confirm the same, shall be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, or by some other persons by them thereunto lawfully authorized, and, after confirmation, and acceptance of confirmation, such lease shall be valid. and shall be deemed to have had, from the granting thereof, the same effect as if the same had been originally valid.

14. Where a lease granted in the intended exercise of any power of leasing is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the land comprised in such lease has continued after the time when such, or the like lease, might have been granted by him in the lawful exercise of such power, such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions of sections 11 to 17 shall apply to every such lease.

15. Where a valid power of leasing is vested in, or may be exercised by, a person granting a lease, and by reason of the determination of the estate, or interest of such person, or otherwise, such lease cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of the next preceding four sections, be deemed to be granted in the intended exercise of such power, although such power is not referred to in such lease.

16. Nothing in sections 11 to 17 shall extend to, prejudice, or take away, any right of action, or other right or remedy, to which, but for the next preceding five sections the lessee named in any such lease, his heirs, executors, administrators or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or prejudice, or take away, any right of re-entry, or other right or remedy to which, but for such sections, the person granting such lease, his heirs, executors, administrators, or assigns, or other person, for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for, or by reason of, any breach of the covenants, conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed.

17. The next preceding six sections shall not extend to any lease where before the 10th day of June, 1857, the land comprised therein has been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease."

These sections appeared in R. S. O. 1897, Vol. III., c. 330, until 1911, when by 1 Geo. V. c. 37, they were carried into the Landlord and Tenant Act. The sections are taken from the Imperial Act (1849) 12 & 13 Vict. c. 26, s.-s. 2, and (1850) 13 Vict. c. 17, ss. 2 to 7, both inclusive.

See *Atkinson v. Farrell* (1912) 27 O. L. R. 204 [Div. Ct.]; *National Trust Co. v. Shore* (1908) 16 O. L. R. 177; 11 O. W. R. 228 [Meredith, C.J.C.P.].

The Master of Titles in Saskatchewan has held that the proper proof to the registrar of the death of a lessee for life would be a certificate of death from the medical practitioner who attended deceased and from the undertaker who buried him, together with the statutory declarations of parties who are in a position to make same, that the deceased is the same person as the person who held as lessee the lease for his life of the registered land. *Cancellation of Lease for Life*: (1913) 5 W. W. R. 796.

#### *Tenant Pur Autre Vie.*

Where a person holds for the term of another's life he is called tenant *pur autre vie*. Leases made by him determine on the death of the person for whose life he holds: *Blake v. Foster* (1800) 8 T. R. 487, but not on his own death: Com. Dig. tit. Estates (E. 1).

The 19 Car. II. c. 6, s. 2, provides that the *cestui que vie* shall be accounted dead when he goes abroad and there is no sufficient proof that he is alive. Section 5 of the Act provides for reinstating any person evicted when the *cestui que vie* was abroad, should he afterwards return. The 6 Anne, c. 18, gives to remaindermen, reversioners or expectant heirs, the right to the production of the persons upon whose death their respective estates are to vest.

And see the provisions noted at p. 805, *post*.

*Tenants by the Curtesy or in Dower.*

Tenants by the curtesy or in dower, may at common law grant leases, which will endure as long as their interest lasts, but such leases become absolutely void at their death: Bac. Ab. tit. Leases (II.).

In Canada, when the owner of land dies, the statutes considered at p. 1006, *post*, cast the estate on the personal representatives, who would be necessary parties to every lease, before assignment of dower or curtesy: *Martin v. Magee* (1892) 18 A. R. 384; 19 O. R. 705; *Re Canadian Pacific Ry. Co.* (1893) 24 O. R. 205.

But when his estate vests it would seem that a tenant by the curtesy may make a lease which would be good so far as his interest extended: *Dockstader v. Phipps* (1886) 9 P. R. 204. The estate by the curtesy still exists in Ontario: *Archer v. Urquhart* (1892) 23 O. R. 214, and there is now a clear right of leasing.

The R. S. O. 1914, c. 119, does not take away the widow's right to dower: s. 9 (1), but the executor should be a party to any lease before assignment of dower. The R. S. O. 1914, c. 74, gives a power to lease to "a tenant in dower," and the widow is not such before assignment. See, also, the Dower Act, R. S. O. 1914, c. 70.

Dower and tenancy by the curtesy are abolished in Alberta: 6 Edw. VII. c. 19, ss. 5 and 6.

In Manitoba there is neither dower nor curtesy properly so called: R. S. M. (1913) c. 54, ss. 19-20.

A tenant in dower may make a lease which will give the lessee the right to maintain trespass against the tenant of the freehold: see *Fisher v. Grace* (1867) 27 U. C. R. 158.

Under the former law the husband might make a lease for years of his wife's land, but on his death, before his wife, the term came to an end: *Burns v. McAdam* (1865) 24 U. C. R. 449. The wife could not lease her own land without the concurrence of her husband: *Emrick v. Sullivan* (1866) 25 U. C. R. 105; *Nolan v. Fox* (1866) 15 U. C. C. P. 565.

A doweress whose dower has not been assigned has no estate in the land out of which she is entitled to

dower, but as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to persons claiming under leases created by her husband, without her assent, during the coverture: *Allan v. Rever* (1902) 4 O. L. R. 309, 22 Occ. N. 294 [Street, J.], following *Stoughton v. Leigh* (1808) 1 Taunt. 402.

See also the statutes considered pp. 20, *et seq.*—*ante*, and *Choma v. Chmelyk* [1918] 2 W. W. R. 382.

### *Tenant from Year to Year.*

A tenant from year to year may assign his term: *Allcock v. Moorehouse* (1882) 9 Q. B. D. 366 [C.A.], or sublet, and where he demises for a term of years and the original tenancy lasts beyond that term, the demise operates not as an assignment but by way of sub-lease and there is a reversion thereon: *Oxley v. James* (1844) 13 M. & W. 209; *Mackay v. Mackreth* (1785) 4 Doug. 213, and if he sub-let from year to year the sub-tenancy will continue during his own tenancy and he will have a sufficient reversion to enable him to distrain: *Pike v. Eyre* (1829) 9 B. & C. 909.

This subject is discussed under Articles 21, pp. 180 *et seq. post* [sub-leases], and 138 pp. 1033 *et seq., post* [assignments].

### *Tenancy for Years.*

A tenant for years [see Article 22] who has not covenanted not to sub-let, may demise for any less term than he has himself: Bac. Abr. tit. Leases.

### *Tenant at Will.*

A tenant at will [see Article 25] cannot demise, for he thereby puts an end to his estate: see Articles 25 and 138.

### *Tenant at Sufferance.*

Neither can a tenant at sufferance [see Article 26] for one such tenant cannot make another: see Articles 26 and 138.

*May Grant Leases.*

A lease is a conveyance of lands or tenements for life or lives, for years or at will, but always for a less term than the party conveying himself has in the premises, for if it be for the whole interest it is an assignment and not a lease. See Stroud (2nd ed.) 1069: *O'Connor v. Peltier* (1908) 18 M. R. 91; 8 W. L. R. 576 [Macdonald, J.].

This statement must be read, in Ontario, in the light of R. S. O. 1914, c. 155, s. 3, referred to in the notes to Article 1, and see *Harpelle v. Carroll* (Ont.) there discussed.

"The word 'lease' does not in law import a written instrument," per Abinger, C.B., *Bridgland v. Shapter* (1839) 5 M. & W. 381; 8 L. J. (Ex.) 256.

At common law a lease may be by parol [*Bridgland v. Shapter*], by writing [*Duxbury v. Sandford* (1898) 80 L. T. 552] or by deed [*St. Germain's (Earl) v. Willan* (1823) 2 B. & C. 220]. See now Articles 5 to 11 and notes.

The agreement must be *bona fide*, otherwise the relationship will not be created: *Stikeman v. Fummerton* (1911) 21 M. R. 754; 16 W. L. R. 502 [Macdonald, J.]; *Waterous Engine Works v. Wells* (1911) 16 W. L. R. 274.

So where a lease is made with an ulterior motive, namely, to defeat creditors or give a preference, it will not create the relationship: *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S. C. R. 483, considered at p. 230, *post*; *Imperial Loan and Investment Co. v. Clement*; *Re Coulter* (1896) 11 M. R. 428 [Ct. en B.]; *Re Murray* (1896) 11 M. R. 445.

The usual test of *bona fides* is found in a consideration of the amount of the rent; if it is excessive that will be considered strong, though not conclusive, evidence that the transaction had an ulterior object.

This subject is discussed at some length in considering the question of attornment clauses in mortgages: see pp. 226, *et seq.* (*post*).

The letting must not be for an illegal purpose.

Premises leased for use as an hotel did not to the knowledge of the lessor and lessee at the time of entering into the lease comply with the requirements of the law. The proper authorities prevented the use of the premises. In an action for rent and on the covenant to repair it was held that the lease was void *ab initio*, or if not that it became void when the authorities stopped the further use of the premises as an hotel: *Hickey v. Sciutto* (1904) 10 B. C. R. 187; 24 Occ. N. 106.

### *Rectification and Rescission.*

Leases will be rectified or set aside upon the same grounds as other contracts, *e.g.*, fraud, misrepresentation, duress, undue influence, and mistake. This subject not being properly part of the subject dealt with in these notes, will not be considered other than to refer to the following cases:

*Reformation:* *Klees v. Dominion Coat and Apron Supply Co.* (1904) 3 O. W. R. 841, 937; (1907) 9 O. W. R. 200; *Tew v. O'Hearn* (1912) 3 O. W. N. 1116; *Empire Limestone Co. v. Carroll* (1913) 25 O. W. R. 652; 5 O. W. N. 708; 3 O. W. N. 1159; *Booth v. Callow* (1913) 24 W. L. R. 813; 4 W. W. R. 73, 1379; 11 D. L. R. 124; [B.C.—C.A.]; *Pigeon v. Preston* (1912) 22 W. L. R. 894; 6 D. L. R. 399; 3 W. W. R. 694 [Sask.]; *Robinson v. Estabrooks* (1909) 9 N. B. Eq. 168; 7 E. L. R. 131; *Dawson v. Graham* (1880) 41 U. C. R. 532; *Forse v. Sovereign* (1887) 14 A. R. 482; *Rudd v. Manahan* (1912) 2 W. W. R. 798 [Walsh, J.], affirmed (1913) 4 W. W. R. 350; 5 Alta. L. R. 19 [App. Div.]; *Connor v. Ferguson* [1920] 3 W. W. R. 403 [Man.—Curran, J.].

*Rescission:* *Duprat v. Daniel* (1901) 1 O. W. R. 561; (1902) 2 O. W. R. 940 [Div. Ct.] [Improvvidence]; *Ruff v. McFee* (1912) 23 O. W. R. 597; 4 O. W. N. 501; 9 D. L. R. 519 [Div. Ct.]; 24 O. W. R. 862; 25 O. W. R. 652; 5 O. W. N. 708; *Hillock v. Sutton* (1883) 2 O. R. 548 [Fraud]; *Shanaghan v. Shanaghan* (1884) 7 O. R. 209 [Improvvidence]; *Hagarty v. Hagarty* (1890) 19 O. R. 381; *Angus v. Maitre* (1916) 11 O. W. N. 335 [Improvi-



dence]; *Robinson v. Shannon* (1919) 17 O. W. N. 234 [Misrepresentation] [Falconbridge, C.J.K.B.].

*Damages for Misrepresentation: Booth v. Beechy* (1906) 7 Terr. L. R. 435; 5 W. L. R. 71; *Johnstone v. Hall* (1894) 10 M. R. 161; 14 Occ. N. 405.

One partner cannot treat privately and behind the backs of his co-partners for a lease of the premises, where the joint trade is carried on for his own individual benefit; if he does so treat, and obtains a lease in his own name, it is a trust for the partnership: *Featherstonhaugh v. Fenwick* (1810) 17 Ves. 298.

But when an existing lease to a partnership which was being wound up had several months to run, and no renewal was necessary for the purpose for which the partnership then continued to exist, and the premises were not necessary for the proper winding-up of the partnership beyond the expiration of the old lease, it was held that one partner might renew the lease for his own benefit: *Mah Kong Doon v. Mah Kap Doon* [1918] 1 W. W. R. 610 [Alta.—App. Div.].

*Repudiation: City of Toronto v. Mallon* (1903) 2 O. W. R. 933; (1904) 4 O. W. R. 386 [C. A.] and see Article 19.

*For Any Period Commensurate with their Respective Interests.*

As has been seen, pp. 2 and 75, a lease for the whole interest of the grantor is an assignment and not a lease.

Leases for a term greater than the grantor's are dealt with under Article 4, Tenancy by Estoppel.

They generally operate as valid demises during so much of the term as the grantor has power to grant. Thus, a lease by a tenant for life is good during his life, though it purport to extend beyond the duration of any human life.

## ESTOPPEL.

ARTICLE 4.—Even a person having no interest in the premises demised may make a lease, which though inoperative as against the real owner, will create a tenancy by estoppel as between the lessor and lessee; the estoppel may be *by deed*, where there is a duly executed lease under seal, or *by matter in pais* where one person is let into possession by another and takes possession under him.

[Authorities: *Casselman v. Casselman* (1885) 9 O. R. 442; 18 Hals. s. 769; 13 Hals. s. 527; *Morton v. Woods* (1868) L. R. 3 Q. B. 658, and see Article 32, p. 245, *post*.]

It frequently happens that two parties will agree that one shall be landlord and the other tenant in respect of lands which the “landlord” does not own; sometimes the “landlord” has possession of the lands but no title; sometimes he has title but not possession; sometimes he has neither title nor possession.

The relationship is sometimes created by deed; sometimes by acts of the parties, *e.g.*, the going into possession and payment and acceptance of rent *qua* rent.

In such a case when the deed is executed or the “tenant” goes into possession of the lands, neither the landlord nor the tenant will be permitted to say that at the time they created the relationship the landlord had no title to the lands.

The question frequently arises in the case of attornment clauses in mortgages. A “mortgage” or “charge” under the “new system” conveys no title to the mortgagee and he does not take possession, but it is frequently agreed that the “mortgagor” becomes tenant of the “mortgagee” in respect of the lands mortgaged. This is dealt with at length in Chapter V., *post*; see particularly Article 32.

In these cases there is said to be a tenancy by estoppel; where the relationship is created by deed the estoppel is by deed; where there is no deed the estoppel is said to be *by matter in pais*.

It may happen that the landlord has some interest in the lands demised, but not so large an interest as he purports to grant. In such a case a tenancy does not arise by estoppel; an interest does pass and the tenant holds by that interest: Co. Lit 45 (a): *Serjeant v. Nash, Field & Co.* [1903] 2 K. B. 304 [C. A.].

A termor made a first and second mortgage, both giving him the right to possession until default. There being no default on the first mortgage when the second was signed, an interest passed under it, and the second mortgagee having obtained an assignment of the first mortgage after default thereunder, it was held that the mortgagor could not set up the re-demise in the second mortgage as a bar to an ejectment brought under the first: *James v. McGibney* (1865) 24 U. C. R. 155.

But a further distinction arises where the landlord has an interest in part only of the lands demised and no interest in the remainder. As no interest passes out of the latter part of the demise the tenant has a good title by estoppel to that part: *Williams v. Burrell* (1845) 1 C. B. 402.

Should a lessor having no estate when the lease was made afterwards acquire an estate, the lease which before operated by estoppel only becomes a lease in interest from the date of the demise; the legal estate is said to "feed the estoppel": Co. Lit. 47 (b); *Webb v. Austin* (1844) 7 M. & G. 701; *Cuthbertson v. Irving* (1859) 4 H. & N. 743; *Re Bridgewater's Settlement, Partridge v. Ward* [1910] 2 Ch. 342.

An under-lease made by a lessee who at the time of making it and subsequently had no legal interest, operates as a demise by estoppel: *Doe d. Pryor v. Ongley* (1850) 10 C. B. 25. If a lease be made by one who has no interest, the lease becomes good on the lessor's subsequently acquiring an interest: *Treviban v. Lawrence* (1704) 1 Salk. 276; *Sturgeon v. Wingfield* (1846) 15 M. & W. 224; 15 L. J. (Ex.) 212; *Webb v. Austin* (1844) 7 M. & G. 701; unless it appear by the recitals in the lease that he had nothing at the time of the demise: *Hermitage v. Tomkins* (1700) 1 Ld. Raym. 729.

*The Reason of the Rule.*

In *Woods v. Opsal* [1918] 1 W. W. R. 989 [B.C.], Macdonald, J., considers at some length the various English authorities in which "the reason and policy of the law by which tenants are restricted from abusing a possession, procured by confidence, to the injury of their landlords," is laid down, and quotes Ashurst, J., in *Parker v. Manning* (1798) 7 Term. Rep. 537, at p. 539: "The general rule is, that a tenant cannot be permitted to controvert the title of his landlord; and it is founded on good sense; for so long as the lessee continues to enjoy the land demised it would be unjust that he should be permitted to deny the title under which he holds possession."

"A tenant who enters under one title cannot turn around and say he entered under another. . . The principle is that a man who gets in by reason of being tenant must take land under his original take," per Charles, J., in *Tabor v. Godfrey* (1895) 64 L. J. (N. S.) (Q. B.) 245, cited by Britton, J., in *City of Toronto v. Ward* (1908) 18 O. L. R. 214, at p. 219; 11 O. W. R. 653.

"So careful have the Courts been to protect the rights of landlords and give redress against tenants denying the landlord's title that in such cases, in an action for recovery of possession, neither notice to quit nor demand of possession has been deemed necessary: see *Doe d. Graham v. Edmonson* (1844) 1 U. C. R. 265; *Doe d. Burnett v. Dunham* (1847) 4 U. C. R. 99; *Cartwright v. McPherson* (1860) 20 U. C. R. 251": *City of Toronto v. Ward* (*ante*) [Britton, J.].

"The principle of *caveat emptor* was, according to Foa on Landlord and Tenant, 5th ed. 140, applied as against a tenant in *Clayton v. Leech* (1889) 41 Ch. D. 103": *Woods v. Opsal* (*ante*) [Macdonald, J.].

The difference between the estoppel by the deed itself and the estoppel by reason of the relationship established by letting into possession should be noticed: see Everest and Strode, p. 268.

*Estoppels by deed* should be "mutual" or "reciprocal," according to the old maxim, which is, however, subject to the rule of construction that when the statement is intended to be the statement of one of the parties only—and not one upon which they have mutually agreed—it is binding upon that party only: 13 Hals. ss. 454, 515.

*Estoppels by deed* are binding upon the parties and their "privies": 13 Hals. s. 515.

Where a lease by deed is made and the tenant let into possession under it the estoppel arises upon the deed and also upon the letting into possession—where there is no deed the estoppel arises by conduct (*matter in pais*) upon the letting into possession and the payment of rent: 13 Hals. ss. 566 and 453.

The acceptance of an estate on one hand and of rent on the other were some of the solemn acts of notoriety referred to by Coke as matters *in pais* working an estoppel: Co. Lit. 352 (a). The phrase has a much wider application at the present time.

"Estoppel is only a rule of evidence. You cannot found an action upon estoppel": *Low v. Bouverie* [1891] 3 Ch. 82 [C. A.], per Bowen, L.J., p. 105, and see *Harri-man v. Harriman* [1909] P. 123 [C. A.].

At common law the person who made the representations was not allowed to deny their truth; in equity he had to make his representations good: 13 Hals. 532.

### *Estoppel by Deed.*

Where a lessee executes the lease and enters into possession under it he cannot [if no issue of fraud is raised]: *Sivret v. Young* (1906) 38 N. B. R. 571 (Full Ct.) dispute his landlord's title so long as he remains in such possession: *White v. Nelles* (1885) 11 S. C. R. 587; *Cuthbertson v. Irving* (1859) 6 H. & N. 135; 29 L. J. Ex. 485, and as an estoppel by deed is mutual the landlord is also bound: *Hartcup v. Bell* (1883) 1 C. & E. 19.

### *Estoppel by Matters in pais.*

As between landlord and tenant estoppel is not confined to matters of deed, upon the principle that a person

who gets possession from another is, by taking possession from him, estopped from denying his right to possession a tenant is not permitted either in an action of ejectment or trespass or for rent to dispute the title—at the time of delivery of possession—of the landlord by whom he was let into possession: *White v. Nelles* (1885) 11 S. C. R. 587 [Ont. App.] *Smith v. Modeland* (1861) 11 U. C. C. P. 387; *Sands v. Phillips* (1839) 3 N. B. R. 86, 533; *Hartley v. Jarvis* (1850) 7 U. C. R. 545.

### *The Tenancies Affected.*

The estoppel applies to tenancies from year to year at will or on sufferance, as well as to leases for years: 13 Hals. s. 566.

“The rule of law that a tenant cannot dispute his landlord’s title extends not only to cases where the tenant received possession from his lessors, but also to cases where a person in possession accepts a lease from one claiming to be owner of the property; in both cases he is estopped, but in the latter case the estoppel is only *prima facie*, leaving it open to the tenant to show that he was induced to accept the lease through fraud or mistake”: per Peters, J.: *McKinnon v. McKinnon* (1878) 2 P. E. I. R. 279.

### *Who Are Bound?*

So the heir at law of the tenant is estopped: *Armstrong v. Armstrong* (1871) 21 U. C. C. P. 4; so also an assignee of the term: *Annis v. Corbett* (1844) 1 U. C. R. 303, and a stranger whose goods are seized on the premises: *Smith v. Aubrey* (1849) 7 U. C. R. 90; *Brown v. Garden* (1860) 19 U. C. R. 518. But a stranger will not be estopped if the lessor have no title: *Tadman v. Henman* [1893] 2 Q. B. 168. The rule, however, applies though the lessor be a guardian only: *Downey v. Crowell* (1892) 24 N. S. R. 318, or has only an equitable title: *Bank of Montreal v. Gilchrist* (1881) 6 A. R. 659, or the tenant occupies other lands besides those leased: *Davey v. Cameron* (1856) 14 U. C. R. 483.

The rule applies to any person who obtains possession from the tenant or under-tenant by an arrangement made with him, whether by collusion or otherwise, but without any deed of assignment or under-lease: *Doe d. Bullen v. Mills* (1834) 2 A. & E. 17. The defendant obtained possession of land from the plaintiff's tenant by representing that he had the title to it and threatening to eject the tenant, and it was held that the defendant was estopped from disputing the plaintiff's title and setting up an adverse title in himself: *Bliss v. Estey* (1855) 8 N. B. R. 489, approved of in *White v. Nelles* (1884) 11 S. C. R. 587.

In an action brought by the assignee of the term for rent due from March, 1855, it was proved that one Stanton, in 1844, leased to one March for 21 years, who in August, 1853, assigned to one Philpotts, who assigned to the defendant, and it was held that he being assignee of March, and having entered, could not dispute Stanton's right to make the demise in question: *Jones v. Todd* (1863) 22 U. C. R. 37.

An assignee is estopped by the deed which estops his assignor: *Taylor v. Needham* (1810) 2 Taunt. 278; and an assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease: *Nash v. Turner* (1794) 1 Esp. 217; so an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact: *Johnson v. Mason* (1794) 1 Esp. 89. Where L. entered into possession as tenant of F. under a yearly rent, it was held that he could not set up by way of defence to an action brought by the legal assignee of F. for the rent accrued subsequent to the assignment; that a third person disputed the right of the plaintiff, claiming also as assignee of F.: *Ansley v. Longmire* (1843) 4 N. B. R. 321.

Third persons not claiming or having possession of the land, are not estopped. Therefore a lessor having

no title in fact, cannot distrain the goods of a person occupying the premises by the tenant's license: *Tadman v. Henman* [1893] 2 Q. B. 168; see, however, *Brown v. Garden* (1860) 19 U. C. R. 518.

Where a person entitled as co-parcener to a portion of the rents and profits of land makes a lease of the whole, under which the tenant enters and pays rent as for the whole until the lessor's death, the tenant is estopped from denying that the heir and privy in blood to the lessor is entitled to the whole of the land: *Weeks v. Birch* (1893) 69 L. T. 759. S. entered into an agreement to mortgage, amongst other lands, certain lands known as the Dominion hotel property. A mortgage was on the same day executed, but by mistake the hotel property was omitted therefrom, and a lot formerly owned by S., adjacent thereto, inserted. The tenant of S., after the mortgage, attorned, and paid some rent to the mortgagees, believing them to have a title to the lands, and it was held that after such attornment and payment of rent, he could not be heard to deny the title, and the mortgagees being the equitable owners of the land were entitled to recover: *Bank of Montreal v. Gilchrist* (1881) 6 A. R. 659.

Where the lease stated that the lessors were owners subject to a mortgage, and that they demised the land to the lessee, it was held that neither party was estopped from denying that the lessors had a legal reversion, but that they were estopped from asserting it: *Pargeter v. Harris* (1845) 7 Q. B. 708; see, however, *Morton v. Woods* (1869) L. R. 4 Q. B. 293.

In an action on a bond conditioned for the payment of the rent of certain premises recited in the condition to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved: *Lainson v. Tremere* (1834) 1 A. & E. 792.

A tenant of a mortgagee has a right to set up the title of the latter as a defence to an action of ejectment brought by the person holding the equity of redemption:



*Smith v. Snarr* (1877) 17 N. B. R. 56; and if a mortgagor in possession make a lease, the tenant may set up the mortgagee's title against the mortgagor, if he has paid rent to the mortgagee, or otherwise become his tenant: *Diffin v. Simpson* (1850) 5 N. B. R. 194; *Joplin v. Johnson* (1848) 4 N. B. R. 541. Indeed it is clear that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee either actual or constructive (for instance an attornment to him under threat of eviction), dispute the mortgagor's title to either the land or rent, and further he may, although there has been no eviction, defend an action for rent by proof of a payment under constraint in discharge of the mortgagee's claim: *Moss v. Gallimore*, and the other cases noted at p. 218, *post*.

A. on the 14th of August, 1844, demised certain land to B. and C. for a year from the 1st of January, 1845. A. afterwards, on the 23rd August, 1844, conveyed the land in fee to D., taking back on the same day a mortgage to secure the payment of the purchase money on a certain day, the mortgagor to remain in possession until default. On the 1st of December, 1845, B., one of the lessees, let E. into possession for a month, bringing the time up to the end of the term for which A. had demised to B. and C. E. refused to go out at the end of the month, on which D. brought ejectment. It was held that E. was not estopped as tenant of the assignee of A. from showing that the title the assignee had once held had ceased by his giving the mortgage under which A. and not D., since the default made, was entitled to possession, for here the tenant was not resisting an action by the lessor, but was in fact setting up the latter's title against a person who claimed to have purchased from him since the lease was made: *Doe d. Marr v. Watson* (1847) 4 U. C. R. 398.

*Scarborough Trustees v. Locke* (1912) 4 O. W. N. 228; 23 O. W. R. 239; 6 D. L. R. 897 [Riddell, J.] was a case of a tenancy at \$200 a year until the property was sold. A sale was made to S. The tenant sent a cheque to the landlord marked "rent to Sept. 15, 1911," a date

after that of the sale. The landlord cashed the cheque. Held, the landlord could so estop himself and S., but the estoppel only extended to September 15th, and that it was no case for compensation. The tenant knew what his tenancy was.

*The Person from whom Possession is Obtained.*

The estoppel only applies in favour of the person from whom the tenant actually received possession.

For while a tenant is just as much estopped in an action by a plaintiff claiming through or under the original lessor as in an action by such lessor himself from disputing the right and title of the lessor to demise: *Cuthbertson v. Irving* (1859) 6 H. & N. 135; *Taylor v. Needham* (1810) 2 Taunt. 278, he is not estopped from denying that the reversion is vested in the plaintiff unless he has acknowledged the plaintiff as his landlord: *Doe v. Burton* (1851) 16 Q. B. 807; *Cooper v. Blandy* (1834) 1 Bing. N. C. 45; *Hall v. Butler* (1839) 10 A. & E. 204. If the plaintiff claims as assignee, or as heir, or as devisee, executor or administrator, the defendant may dispute the assignment: *Rennie v. Robinson* (1823) 1 Bing. 147; the heirship, *Doe v. Seaton* (1835) 2 C. M. & R. 728, or that the reversion passed by the will; or he may prove that the executor had assented to a specific bequest of the reversion to another person: *Mason v. Farnell* (1844) 12 M. & W. 674; *Doe v. Harris* (1847) 16 M. & W. 517-520; or that the plaintiff had parted with the reversion by sale, mortgage or otherwise: *Doe v. Watson* (1817) 2 Stark 230; *Doe v. Edwards* (1834) 5 B. & Ad. 1065. He may dispute the title of the assignee of the reversion unless he has paid rent to him, which is *prima facie* evidence of the title of the assignee: *Carlton v. Bowcock* (1884) 51 L. T. 659.

A person who takes a mortgage from a lessor on the reversion becomes an assignee thereof: *Dauphinais v. Clark* (1885) 3 M. R. 225; *Staveley v. Alcock* (1851) 16 Q. B. 636. But where the mortgage gives to the mortgagor the right to possession for a determinate period,

it amounts to a re-demise and re-grant of part of the reversion where the instrument is executed by the mortgagee: see *Holland v. Vanstone* (1867) 27 U. C. R. 15; *Harmer v. Bean* (1853) 3 C. & K. 307; and as to the mortgagor, it seems the estoppel would operate as before.

Where a person claiming to be assignee of the reversion, without fraud or misrepresentation, receives rent from the tenant, the latter cannot afterwards deny that title, except by showing that he paid the rent in ignorance of the true state of the title, and that some other person is the real assignee of the reversion: *Doe v. Wiggins* (1843) 4 Q. B. 367.

A declaration stated a lease of a certain tenement to be used as a dwelling house for certain rent, whereby it became the lessee's duty not to remove or despoil the same, yet he did remove the house which thereby became wholly lost, and for that the lessee converted to his own use certain goods and chattels, to wit, a building and the materials of which it was composed. Plea, that the building was situate on the leased land and encumbered the same, wherefore the lessee gave due notice to the plaintiff to remove it, and because it was not removed in a reasonable time, the lessee removed it. This plea was held bad for having accepted a lease of the house which would carry with it the land on which it stood, the lessee was estopped from thus denying his landlord's title: *Renalds v. Offitt* (1857) 15 U. C. R. 221.

#### *The Title at the Time of Delivery of Possession.*

"There is no estoppel where an interest passes." The meaning of this maxim is that a tenant is never estopped from showing that the lessor's interest has expired because it is not repugnant to anything he has admitted by taking the lease: *Hartley v. Jarvis* (1850) 7 U. C. R. 545.

Locatees of mining claims entitled to possession leased the land for five years covenanting for quiet enjoyment, and the lessees covenanted to pay the Government rent and to pay royalties to the lessors monthly—a cer-

tain minimum being fixed. The lessees did not take possession—although they had the right to—and part of the application of the locatees was cancelled. In an action by the lessors to recover rent it was held that the tenants were estopped from denying the locatees' title at the time of the lease: *Clary v. Lake Superior Corporation* (1908) 11 O. W. R. 381 [Mulock, C.J.] 12 O. W. R. 6 [Div. Ct.].

The tenant may dispute his landlord's title in the following cases:

1. If it has expired at a period subsequent to letting the tenant into possession: *Hartley v. Jarvis* (*ante*, p. 87).

A tenant is never estopped from pleading that the lessor's interest has expired because it is not repugnant to anything he has admitted by taking the lease: *Hartley v. Jarvis* (1850) 7 U. C. R. 545. A tenant in possession after the expiry of the term may set up as against the landlord that the latter's title expired or was put an end to during the term, and to raise such defence it is not necessary to go out of and then resume possession: *Kelly v. Wolff* (1888) 12 P. R. 234. Where the reversioner in fee accepted a lease from the tenant for life, on the death of the latter the reversioner was allowed to show that he himself had become owner: *Thatcher v. Bowman* (1889) 18 O. R. 265. So the tenant may show that the lessor's title has been extinguished by the Statute of Limitations: *Cahuac v. Scott* (1872) 22 U. C. C. P. 551.

Certain land had been granted to the plaintiff's wife and during her lifetime he had allowed B. to occupy. She afterwards died without children and the plaintiff brought ejectment, and it was held that B. was tenant at will to the plaintiff, whose interest was only in right of his wife, and as he did not become tenant by the curtesy, the death of the wife put an end to the tenancy, and B. could deny the plaintiff's title and set up title in himself by descent: *Robertson v. Bannerman* (1859) 17 U. C. R. 508.

One H., a widow, having possession of the land in question but no other title, leased it on the terms that the lessee was to give her \$60 a year as long as she lived, and then to do the best he could with the heirs of her husband, who owned in fee. In an action by A. claiming under the will of H., and as assignee of her heir at law for rent due after H.'s death, it was held that the lessee was not estopped from showing that H.'s title determined at her death, and that she claimed and professed to give him no title beyond that period. But it further appeared that the lessee, under a judgment and execution recovered by him against P., the heir at law of H., had P.'s interest in this land put up for sale by the sheriff, when A. purchased and paid the purchase money, and it was held that the lessee was precluded from disputing A.'s title derived under such sale: *Patterson v. Smith* (1881) 42 U. C. R. 1; but see *Pyatt v. McKee* (1883) 3 O. R. 151; *Downey v. Crowell* (1892) 24 N. S. R. 318.

2. If the landlord has at such subsequent period been treated as a trespasser.

3. If the landlord has at such subsequent period sold or mortgaged his interest.

The lessee may show that the lessor has parted with his interest. Thus if the latter mortgage his reversion, the lessee may [see p. 86, *ante*] set up that fact when the mortgagee claims the rights of the lessor: see also *Doe d. Marr v. Watson* (1846) 4 U. C. R. 398. See further on the point that there is no estoppel after the lessor's title ends: *Neave v. Moss* (1823) 1 Bing. 363; *Doe v. Ramsbotham* (1815) 3 M. & S. 516; *Claridge v. MacKenzie* (1842) 4 M. & G. 143; *Doe v. Skirrow* (1837) 7 A. & E. 157.

4. If the landlord has been evicted by title paramount.

5. If the landlord has been evicted by a party entitled to immediate possession.

6. If the tenant has, under threat of eviction, attorned to a party entitled to immediate possession under title paramount.

7. If the tenant can show a better title in himself.

8. If the landlord claims an interest greater than the one granted the tenant is only estopped to the extent of the interest granted.

The plaintiff landlord claimed from the tenant possession of lot 5. In the Crown grant the description of lot 5 was that it began at the south-east angle of lot 6 "on the bank of Lake Erie," and two of the courses were south "to the bank of the lake" and westerly "along the bank" to the place of beginning.

It was held, following *Williams v. Pickard* (1908) 17 O. L. R. 547, that the south boundary of lot 5 is the water's edge or low water mark; and, the lease having expired, the plaintiff was entitled to recover possession of the lot so bounded.

It was also held that the beach and front of lot 5 was not part of the plaintiff's property, and the tenant was not estopped from disputing the plaintiff's claim of title: *Carroll v. Empire Limestone Co.* (1919) 45 O. L. R. 121; 48 D. L. R. 44; 15 O. W. N. 386; 13 O. W. N. 411 [App. Div.].

9. There is no estoppel where the tenant has been induced by force, fraud, or misrepresentation to enter into the lease; or when the lessor procures the execution of a lease by threats; and the owner of the land who takes a lease from a stranger in ignorance of his own right, is not estopped from asserting his own title.

When one having no title by a trick or misrepresentation induces another in possession to take a lease, or to attorn, there is no estoppel, for such person may show that the rent was paid without sufficient ground: *Dauphinais v. Clark* (1885) 3 M. R. 225; *Cornish v. Searell* (1828) 8 B. & C. 471. Where a person in possession accepts a lease from one claiming to be the owner of the property the estoppel is only *prima facie*, leaving it open to the tenant to show that he was induced to accept the lease through fraud or mistake. In December, 1863, a lease for five years was made by H. and after the expiration of this lease he conveyed to E., to whom the lessee paid rent. E., in December, 1876, conveyed to

plaintiff, who brought an action of ejectment, and it was held that the lessee was estopped from disputing the title of H: *McKinnon v. McKinnon* (1880) 2 P. E. I. 279.

Where a tenant goes into possession under A. and then through mistake or misapprehension attorns to B., he may dispute the title of the latter: *Hughes v. Holmes* (1852) 6 N. B. R. 12. So where he is in possession at the time of the demise and did not enter under the landlord, he may in case of misrepresentation or mistake, and notwithstanding attornment and payment of rent, show that the landlord had no right to demise: *Lynett v. Parkinson* (1850) 1 U. C. C. P. 104, per Macaulay, C.J. A. was in possession of premises without title thereto. B. came to A. and represented himself as owner of said premises, when in fact he was not. A. by writing agreed to lease from B. for five years at a rental of £4 10s. This writing was signed by A. alone, and it was held that A. could dispute B.'s title to the premises: *Id.* 144.

If the relationship is not real, but is entered into for a fraudulent purpose, it will not avail as an estoppel. A. conveyed certain land to B. who conveyed to C., but remained in possession, professing to hold as C.'s tenant; C. conveyed to the plaintiff. The defendant claimed under a purchase at a sheriff's sale on an execution against A. and to be in possession through B. as his tenant, and he offered to prove that having commenced an action of ejectment against B., the latter had agreed to become his tenant, and that the transactions between A., B. and C. were fraudulent, the property remaining in A., which evidence having been rejected on the ground that the defendant could not rely on B.'s possession inasmuch as he was tenant to C., and had submitted to a distress for rent at his instance, the Court granted a new trial: *Tennery v. Burnham* (1852) 10 U. C. R. 298.

Where B., being in possession of land, accepted a lease of the same from A., who claimed title thereto, it was held that B. was thereby estopped in an action of ejectment from denying A.'s right to the possession at the termination of the lease, no other person having interfered with B.'s holding under the lease and no fraud

or deception having been practised by A. in order to induce B. to accept the same, and this notwithstanding there was no proof of payment of rent: *Sands v. Phillips* (1839) 3 N. B. R. 86, 533. Where a lessee in possession gives up his right to another person in consideration of a sum of money and the latter claims it as his own, this will be a fraud on the lessor and a forfeiture of the lease, preventing the person thus substituted from setting up any rights under it: *Kyle v. Stocks* (1870) 31 U. C. R. 47.

*When must a Tenant go out of Possession?*

It would seem that a tenant who desires to dispute his landlord's title need only go out of possession when he intends to claim a higher title in himself: 13 Hals., s. 566: *Woods v. Opsal* [1918] 1 W. W. R. 989, at p. 990.

The owner of land who accepts from another claiming title, a lease for a term of years, need not go out of possession at the expiration of the lease and is not estopped from asserting title as against the lessor: *Pictou County v. New Glasgow* (1915) 48 N. S. R. 424.

There can be no estoppel against an Act of Parliament: *Klinck v. Geer* (1910) 14 W. L. R. 282 [Sask.—Lamont, J.].

Although there can be no estoppel against an Act of Parliament, it seems uncertain whether a tenant or licensee of land can object to his landlord's title as being bad by virtue of a statute: see *Hallock v. Wilson* (1857) 7 U. C. C. P. 28, 30; *Philpotts v. Philpotts* (1850) 10 C. B. 85, 970.

“Covenants for title in any deed of conveyance, deed of mortgage or *deed of lease* made since the passing of the first Act respecting short forms of indentures or hereafter made, whether such deed be made in pursuance of the Act respecting short forms of indentures or otherwise, shall operate as an estoppel against the covenantor and all persons claiming title under him”: R. S. M. 1913, c. 64, s. 2.



## CHAPTER II.

### LEASES AND AGREEMENTS—THE NECESSITY FOR A WRITING AND A SEAL.

ARTICLE 5.—*Certain Leases must be in Writing.*

By Deed.

Land under the Torrens System.

Signature.

Leases affected.

ARTICLE 6.—*Possession under parol lease.*

Specific performance.

ARTICLE 7.—*Possession under lease not under seal.*

Specific performance.

ARTICLE 8.—*The Rule where a seal is required at Common Law.*

ARTICLE 9.—*When the demise may be by parol.*

ARTICLE 10.—*Agreements for leases must be in writing.*

ARTICLE 11.—*Possession under agreements not in writing.*

The Judicature Acts.

Prior to the Judicature Act.

Specific performance.

Damages.

### LEASES TO BE IN WRITING.

ARTICLE 5.—The lease must [A] be in writing signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing, and—except in the case of land under the Real Property Acts—[B] by deed: [I.] if for a term of more than three years; [II.] if for any term where the rent reserved is less than two-thirds of the full improved value of the thing demised.

Demises which may be by parol are dealt with in Article 9.

The effects of the failure to comply with the above rules are set out in Articles 6 and 7, and the notes to Article 11.

*The Lease must be in Writing.*

[Authorities: Statute of Frauds, 29 Car. II. c. 3, s. 1 (Imp.), in force in Manitoba, Alberta and Saskatchewan: and re-enacted as R. S. O. (1914) c. 102, s. 2; R. S. B. C. (1911) c. 92, s. 1; R. S. N. S. (1900) c. 141, s. 3 (part); C. S. N. B. (1903) c. 140, s. 7; The Alberta Land Titles Act (1906) c. 24, s. 54; The Saskatchewan Land Titles Act (1917) 2nd Sess., c. 18, s. 92, and see the Manitoba Real Property Act, R. S. M. c. 171, s. 101.

Section 1 of the Statute of Frauds provides that "all leases, estates, interests of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only or by parol, and not put in writing and signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of *leases or estates at will only* [see p. 203], and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding, *excepting* nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised."

*Except in the case of land under the Real Property Acts.*

The Alberta and Saskatchewan Acts provide that when it is sought to lease any land for which a certificate of title has issued for a life or lives or for a term of more than three years, the owner *shall* execute a lease in a form given in the Act.

The Manitoba Real Property Act, R. S. M. 1913, c. 171, s. 101, provides that "when land under the new system is intended to be leased for a life or lives, or for any term of years, the owner may execute a lease in the form contained in schedule C to this Act, setting forth therein all mortgages, encumbrances and liens to which the land is subject, which lease may be registered and a certificate of title for leasehold estate may issue to the lease."

None of the forms requires a seal, and see R. S. O. 1914, c. 126, s. 102.

*The Lease must be by Deed.*

The Imperial Statute (1845) 8-9 Vict. c. 106, s. 3, provides that:—

"A lease required by law to be in writing, of any tenements or hereditaments . . . made after the . . . 1st day of October, 1845, shall also be *void at law* unless made by deed."

This Act is re-enacted by C. S. N. B. 1903, c. 152, s. 12.

By section 2 (2) of R. S. O. 1914, c. 102, "all leases and terms of years of any messuages, lands, tenements or hereditaments, shall be void at law unless made by deed," but this provision is subject to the exception in section 4, which provides that "section 2 . . . shall not apply to a lease or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised."

Under the combined effect of the Statute of Frauds and the R. S. O. c. 102, s. 2 (2), leases for more than three years from the making thereof or reserving less rent than two-thirds of the full improved value must be by deed: *Hogan v. Berry* (1865), 24 U. C. R. 346.

*"Signed by the parties making or creating the same."*

It should be observed that agreements for leases are to be signed by the party to be charged. See Article 10.

*The Leases affected.*

A lease for a year certain reserving to the tenant the right to renew from year to year for a term exceeding three years from the making is not a lease for more than three years from the making and is, therefore, not one which the Statute of Frauds requires to be in writing, nor is it a lease "for a term of more than three years" within the meaning of s. 54 of the Land Titles Act (Alta.). *Hand v. Hall* (1877) 2 Ex. D. 355; 46 L. J. Q. B. 603, followed; *Le Corporation, etc., de St. Albert v. Sheppard* (1913) 3 W. W. R. 814 [Alta.—Scott, J.]. Scott, J., said at p. 285: "A distinction might be drawn between the expression in the Statute of Frauds 'leases not exceeding three years from the making thereof,' and that in the Land Titles Act, 'a lease for a period not exceeding three years.' Were it not for the judgment . . . in *Hand v. Hall*, I think I should be inclined to hold that the lease to C.—[See p. 1027, *post*—]—was within the former statute; but, in my opinion, it could not, in any event, be held to be a lease for more than three years. . ."

In *Hand v. Hall* (*supra*) it was held that a lease not under seal for an original term of less than three years, whether by parol or in writing, is not invalid if it gives a right to the lessee on notice to continue the holding beyond three years from the making of the lease.

So a lease in the alternative for one or three years is good for either. An agreement not under seal in the following form: "This indenture witnesseth that I, E. O., agree to let to A. M. the blacksmith shop, house and lot known as Milligan's Corners, for 1, 3, or 5 years, for the sum of fourteen pounds currency," was held void as a lease for five years, but effectual for either of the lesser terms named, though if no term but five years had been mentioned it would have been void as a lease, but see Article 7, *post*: *Osborne v. Earnshaw* (1862) 12 U. C. C. P. 267.

The Statute of Frauds applies where the tenancy by the contract of the parties must of necessity last for more than three years. If the tenancy when created may last for less than three years, it is not within the Stat-

ute so as to require a writing although it may last for more. Thus where mortgagees were given power to determine the tenancy created by the attornment clause between them and the mortgagor on fourteen days' notice, the lease was held not within the Statute: *Ex parte Voisey* (1882) 21 Ch. D. 442; 52 L. J. Ch. 121 [C.A.].

A verbal agreement or a writing not under seal to lease premises for three years from a future time is void under the Statute of Frauds: *Brewing v. Berryman* (1875) 15 N. B. R. 115; *Foster v. Reeves* [1892] 2 Q. B. 255 [C.A.]. It must be by deed (*supra*) and see *Kaatz v. White* (1869) 19 U. C. C. P. 36; *Hurley v. McDonell* (1853) 11 U. C. R. 208; *Lyman v. Snarr* (1861) 10 U. C. C. P. 462; *Caverhill v. Orris* (1862) 12 U. C. C. P. 392. But as to cases where there is a right to specific performances, see Article 11.

A demise for a term not exceeding three years from the making of it need not be in writing, even though the term is to commence on a future day: *Clarke v. Serricks* (1851) 2 U. C. R. 535.

Where a lease was made "for three years from the 31st day of August then next ensuing," it was held that it would require a writing if the lease itself were not made and executed on the 31st of August or afterwards, as otherwise the full time contracted for could not expire within three years from the making of the bargain: *Christie v. Clarke* (1867) 16 U. C. C. P. 544.

Where the rent reserved by a lease in writing under seal is less than two-thirds of the annual value of the premises, it will be void as a lease: entry and yearly payment of rent would formerly create a tenancy from year to year determinable on the usual half year's notice. See p. 105, *post*. It would, however, create a tenancy for the full term of the void lease: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 (C.A.), and see Article 11. See also *Jackson v. Yeoman* (1879) 39 U. C. R. 280.

A parol lease for one year is valid within the exception of the Statute of Frauds, and the lessor may bring an action for the rent though the lessee has not entered: *Isaacs v. Ferguson* (1890) 26 N. B. R. 1.

## POSSESSION UNDER PAROL LEASE.

ARTICLE 6.—Since the Judicature Act a tenant in possession under a parol lease when the lease should have been in writing is as between himself and his lessor in the same position as if the lease had been in writing if the lease is one of which specific performance would be decreed.

[Authorities: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9; 52 L. J. Ch. 2 [C.A.]; *Lowther v. Heaver* (1889) 41 Ch. D. 248; 58 L. J. Ch. 482; *Rogers v. National Drug and Chemical Co.* (1911) 24 O. L. R. 486 [C.A.].

*Not the Rule in Courts having only Common Law Jurisdiction.*

The above Rule does not apply in actions in inferior Courts which have no equitable jurisdiction. In such Courts the principles given effect to before the Judicature Acts in Common Law Courts will still apply. See p. 106, *post*.

As the tenant so entering is in the position of being in under an agreement for a lease, this Article will be discussed in the notes to Article 11, p. 105.

*The rule prior to the Judicature Acts.*

The Statute of Frauds provided that the parol leases should "have the force and effect of leases at will only." The 8-9 Vict. c. 106, s. 3, made them "void at law" (as to the term) if not under seal.

In *Hobbs v. The Ontario Loan and Debenture Co.* (1890) 18 S. C. R. 483 (Ont. Appeal) Strong, J., said at p. 498: ". . . the tenancy at will arising in such a case is not created by, nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute."

But the Courts do not favour an estate at will, and before the Judicature Act if a tenant entered under a void parol lease and paid rent he was, at *law*, considered to be a tenant from year to year upon the terms of the agreement so far as they were appropriate to such a tenancy. In equity the parol demise was, in such a case, treated *as an agreement for a lease*, which would in a proper case be specifically performed.

Since the Judicature Act law and equity are administered in the one Court and in cases of conflict the rules of equity prevail, so that notwithstanding the statute the above Article applies.

*Who has gone into possession.*

See p. 109, *post*.

*As between himself and his lessor.*

See p. 115, *post*.

*As if the lease had been in writing.*

See p. 105, *post*.

## POSSESSION UNDER LEASE NOT UNDER SEAL.

ARTICLE 7.—Since the Judicature Act a tenant in possession under a lease in writing not under seal which should have been under seal is—as between himself and his lessor—in the same position as if the lease had been executed under seal, if the lease is one of which specific performance would be decreed.

[Authorities: *Walsh v. Lonsdale*, *Lowther v. Heaver*, *Rogers v. National Drug and Chemical Co.*, *ante*.]

This Article, as well as Article 6, will be discussed in the notes to Article 11, where agreements for leases are considered: a tenant who enters under a lease void as not being by deed is in equity as if in possession under an agreement for a lease.

*Not the Rule in Courts having only Common Law  
Jurisdiction.*

This Article—like Article 6—does not apply in actions in inferior Courts having no equitable jurisdiction. In such Courts the common law principles given effect to prior to the Judicature Acts will apply. See p. 106, *post*.

*As between himself and his lessor.*

See p. 115, *post*.

*Prior to the Judicature Acts.*

The Statute 8-9 Vict. c. 106, s. 3 [p. 95, *ante*] provided that the lease must be under seal or that it would be void—that is void as to the term and so only operative to create a tenancy at will.

Strong, J., in *Hobbs v. The Ontario Loan and De-benture Co.* (*supra* p. 98) said at p. 498: “there is nothing in the subsequent statute enacting that when the Statute of Frauds required a writing signed by the lessor a deed should be requisite, and that the lease should be void if not made by deed, which repeals the words of the Statute of Frauds making the lease in such a case so far effectual as to create a tenancy at will. The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment—and the avoidance of the lease has reference only to its nullity as a lease of a term; the tenancy at will arising in such a case is not created by nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years and of the nullity of such a preceding declared by the Statute.”

In *Rogers v. National Drug and Chemical Co.* (1911) 24 O. L. R. 486; 3 O. W. N. 33; 20 O. W. R. 16 [C. A.], Garrow, J.A., delivering the judgment of the Court which affirmed that of Riddell, J. (23 O. L. R. 234; 2 O. W. N. 763; 18 O. W. R. 686), said (p. 488):—

“Prior to the Statute of Frauds, a demise for a term of years by parol was perfectly lawful. That Statute



made a writing (subject to certain exceptions at present of no importance), necessary, and a subsequent statute . . . [See Article 5] required the writing to be under seal. If, however, at law, possession had been taken under the parol demise, and rent paid, the tenant was regarded, as a tenant not at *will* merely, as described in the Statute of Frauds, but as a tenant from year to year, upon the terms contained in the writing so far as appropriate to such a tenancy; while in equity his rights were much larger, for there the Courts would in a proper case decree specific performance, treating the parol demise, if otherwise sufficient, as an agreement for a lease, with the result that the parties were regarded in equity as landlord and tenant from the time possession was taken: see *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 [C.A.], and now under the provisions of . . . the Judicature Act, the equitable rule prevails."

Where a lessee had gone into possession under a lease in writing, but not sealed, it was held that the agreement, although void as a lease, was valid as an agreement, and possession having been taken under it, a tenancy was created: *Brown v. Appenheimer* (1903) 7 Terr. L. R. 51.

*As between himself and his lessor.*

See p. 115, *post*.

*In the same position as if the lease had been executed under seal.*

See p. 105, *post*.

*Specific performance.*

See p. 107, *post*.

#### IF SEAL REQUIRED AT COMMON LAW.

ARTICLE 8.—Article 7 does not apply to any case where the formality of sealing is required to the validity of a lease by some rule of the Common Law.

In the case of a demise merely inoperative by the Statute of Frauds, the contract itself is perfectly valid, and the only effect of the statute being that in a contested suit no evidence can be given of the contract unless the formalities prescribed have been observed, the Court, under certain circumstances, allows these formalities to be dispensed with and the evidence to be given in their absence.

But where the instruments of demise are void by reason of not complying with a rule of the common law, the Courts have refused to uphold them as agreements, and no relief by specific performance can be given. Examples of such cases are actual leases for life: *Browne v. Warner* (1808) 14 Ves. 156, 409; demises by corporations: *Hunt v. Wimbledon* (1878) 4 C. P. D. 48; 48 L. J. Q. B. 207.

#### *Leases to and by Corporations.*

This subject is discussed at p. 29, *ante*, and see Article 45, p. 331, *post*.

### PAROL DEMISE.

ARTICLE 9.—The demise may be by parol if the rent reserved to the landlord during the term amount to two-thirds at least of the full improved value of the thing demised, and if the lease be for a term not exceeding three years from the making even though the term is to commence at a future day.

[Authorities: This is the effect of the exceptions in Statute of Frauds, 29 Car. II. c. 3, s. 2 (Imp.), in force in Manitoba, Alberta and Saskatchewan: R. S. O. (1914) c. 102, s. 4; R. S. B. C. 1911, c. 92, s. 2; R. S. N. S. (1900) c. 141, s. 3 (part); C. S. N. B. (1903) c. 140, s. 7, and see the Statutes referred to under the preceding Articles: *Clarke v. Serricks* (1851) 2 U. C. R. 535; and the cases noted at p. 97, *ante*].

## AGREEMENT FOR LEASE.

ARTICLE 10.—Every agreement relating to the exclusive letting at a future time for a term, however short, of any premises, even of furnished apartments, must be in writing signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

[Authorities: Statute of Frauds, 29 Car. II. c. 3, s. 4, in force in Alberta, Saskatchewan and Manitoba; also re-enacted as R. S. O. 1914, c. 102, s. 5; R. S. B. C. (1911) c. 92, s. 4; R. S. N. S. (1900) c. 141, s. 7; C. S. N. B. (1903) c. 140, s. 1.]

The Statute provides—

“No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed, within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

*The agreement must be in writing.*

The agreement may be collected from several writings so connected as to be in reality all one transaction: *Lovesy v. Palmer* [1916] 2 Ch. 233; 85 L. J. Ch. 481 [Younger, J.].

There must however be a connection between the documents sought to be read together: *Chaproniere v. Lambert* discussed at p. 107, *post*.

A demise for a term not exceeding three years from the making of it need not be in writing, even though the term is to commence on a future day, [see *ante* p. 97] but an agreement to demise, being an agreement for an interest in land within the 29 Car. II., c. 3, s. 4, requires a writing: *Clark v. Serricks* (1851) 2 U. C. R. 535; *Moore*

v. *Kay* (1883) 5 A. R. 261; *Smith v. Thomas* (1907) 41 N. S. R. 216; 2 E. L. R. 394.

Any agreement relating to the letting for a term, however short, of any premises, even of furnished apartments, is within the statute: *Inman v. Stamp* (1815) 1 Stark. 12; *Cavaleiro v. Puget* (1865) 4 F. & F. 537.

But the agreement must provide for exclusive possession of some part, and a mere contract for board and lodging is not within the statute: *Wright v. Stavert* (1860) 2 E. & E. 721; 29 L. J. Q. B. 161; 6 Jur. N. S. 867.

The requisites of the agreement are considered in Article 13 (*post*).

*Signed by the party to be charged therewith.*

It should be observed that leases must be signed by the person "making or creating the same." Article 5.

An agreement for a lease was made on behalf of a tenant association incorporated under the Charitable Associations Act (Man.) by G. its "vice-dictator." It was held that the agreement which was in the form of a letter written by G. to the landlord's agent, was ratified by the acts of the association in requiring alterations to be made in the premises, in paying rent and accepting and retaining keys. It was also held that the appointment of G. need not be under the seal of the defendant. *Pulford v. Loyal Order of Moose* (1913) 5 W. W. R. 452; 23 M. R. 641; 25 W. L. R. 868 [C.A.], reversing (1913) 4 W. W. R. 63; 23 W. L. R. 525; 9 D. L. R. 804.

The signature of the party to be charged must appear in the writings. An offer in writing to take a lease of a theatre, signed by the intended lessees and attested by the lessor's agent, but not naming the lessor, and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intended lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the Statute of Frauds, so as to entitle the lessor to have

the same specifically performed: *Williams v. Jordan* (1877) 6 Ch. D. 517; 46 L. J. Ch. 681.

*Or by some other person thereunto by him lawfully authorized.*

It is to be observed that section 4, unlike section 1, does not require the authorization to be in writing.

Where the contract has been made by an agent in such terms that the agent is not himself liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum of the contract or his identity from the description of him appearing therein cannot fairly be disputed: *Lovesy v. Palmer* [1916] 2 Ch. 233; 85 L. J. (Ch.) 481 [Younger, J.]

#### POSSESSION UNDER PAROL AGREEMENT.

ARTICLE 11.—Since the Judicature Act a tenant in possession under an agreement—either in writing or parol—for a lease is—as between himself and his lessor—in the same position as if the lease had been granted to him in the terms of the agreement—provided that the agreement is one of which specific performance would be decreed.

[Authorities: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 [C.A.]; *Lowther v. Heaver* (1889) 41 Ch. D. 248 [C.A.]; *Rogers v. National Drug and Chemical Co.* (1911) 23 O. L. R. 234; 2 O. W. N. 763; 18 O. W. R. 686; 24 O. L. R. 486; 20 O. W. R. 16; 3 O. W. N. 33; *Township of King v. Beamish* (1916) 36 O. L. R. 325; 30 D. L. R. 116 [App. Div.]; *Bell v. Chartered Trust Co.; Chartered Trust Co. v. Bell* (1919) 46 O. L. R. 192; 17 O. W. N. 88; 50 D. L. R. 45 [App. Div.]; 17 O. W. N. 24; 49 D. L. R. 113; *Crichton's Ltd. v. Green* (1915) 30 W. L. R. 793; 8 W. W. R. 224 [Sask.—Lamont, J.]; *Manchester Brewing Co. v. Coombs* [1901] 2 Ch. 608 [C. A.].

It is proposed to discuss under this Article the questions of (1) a tenant in possession under a lease which

should be in writing but is not, [see Articles 5 and 6]; (2) a tenant in possession under a lease which should be by deed, but is not, [see Articles 5 and 7] as well as, (3) cases under Article 11.

In all these cases the tenant in possession is considered to be in possession under an agreement for a lease. See pp. 98 and 99, *ante*.

This Article only applies to cases in Courts administering law and equity, and will not apply when the matter comes to be dealt with in any inferior Court having only a common law jurisdiction—in such cases the common law rule applies: *Whidden v. Jackson* (1891) 18 A. R. 422, *per* Osler, J.A.; *McGugan v. McGugan*, 21 O. R. 289; 19 A. R. 56; (1893) 21 S. C. R. 267.

The Article only applies, also, in cases between lessor and lessee—it is not operative as against third parties. See p. 115 (*post*).

#### *The Judicature Act.*

The Judicature Acts of 1873 and 1875 have been copied in all the common law provinces of Canada and Judicature Acts are now in force in:

Alberta: C. O. c. 21; 7 Edw. VII. c. 3 and c. 5, and see 9 Geo. V. c. 3.

British Columbia: R. S. B. C. 1911, c. 58 and 133.

Manitoba: R. S. M. 1913, c. 46. But such a Court has been in existence since 1871. See *per* Wood, C.J., in *Boulton v. Shore*, Temp. Wood, p. 376, at p. 380.

New Brunswick: (1909), 9 Edw. VII. c. 5.

Nova Scotia: (1919), 9 Geo. V., c. 32.

Ontario: R. S. O. (1914) c. 56.

Saskatchewan: (1915), 5 Geo. V. c. 10.

#### *Prior to the Judicature Act.*

At common law, when a tenant entered under an agreement for a lease he became a tenant at will, but upon payment and acceptance of rent, a tenancy from year to year was considered to be created.

In equity, however, he was treated as holding under the terms of the agreement, and if the agreement were

one which it was proper to order specifically performed, that relief would be given to him. See *Walsh v. Lonsdale* (*supra*), and the other cases cited—and the notes at pp. 98 and 100, *ante*.

“*One of which specific performance would be decreed.*”

The requisites of a valid lease are set out in Article 14, and of a valid agreement for a lease in Article 13: that is as to what such lease or agreement should contain.

“It is desirable to see upon what ground the doctrine rests under which courts of equity enforce specific performance of parol contracts for the . . . leasing of land, notwithstanding the Statute of Frauds. There is no question but that a decree in such cases would not have the effect of charging the defendant upon the contract itself, but only, to use Lord Selborne’s words in *Maddison v. Alderson* (1883) 8 A. C. 467 (475) 52 L. J. Q. B. 737, upon the equities resulting from the acts done in execution of the contract. . . . At Fry on Specific Performance, 5th ed., p. 290, the learned author, after stating that part performance of a contract may in equity exclude the statute, says: ‘This exception seems to be based on the view that if a man have made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arose,’ ” *per* Warrington, L.J., in *Chaproniere v. Lambert* [1917] 2 Ch. 356; 86 L. J. (Ch.) 726 [C.A.].

In *Walsh v. Lonsdale* (*supra*), Jessell, M.R., said, at p. 14:—

“Now since the Judicature Act the possession is held under the agreement, there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate at equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore,

under the same terms in equity as if the lease had been granted."

Fry (Specific Performance), 5th ed., p. 291, sets out "the essential elements required to establish part performance, which will exclude the statute"—a "most important passage"—*per* Warrington, L.J., in *Chaproniere v. Lambert* (*supra*). These elements must "concur," Fry, p. 291.

ELEMENT 1.—"The acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title." Fry, 291.

But "it is not sufficient to prove acts referable only to the contract alleged, and to no other"—elements 2 (as well as 3 and 4) must also appear: *per* Warrington, L.J., in *Chaproniere v. Lambert* (*supra*), p. 107.

The difficulty presented under this heading usually occurs in cases where the tenant is in possession independently of the new lease—as when the agreement is for the renewal of an existing lease. In such a case, the difficulty is often an "insuperable" one: *per* Kekewich, J., in *Hodson v. Heuland* [1896] 2 Ch. 428, at p. 533; 65 L. J. Ch. 754.

*Griffin v. Brunton* (1914) 6 W. W. R. 1034 [Sask.—Doak, D.C.J.] was such a case. The tenant in possession of the premises sought to have an alleged parol agreement for a new lease at the same rent specifically performed, and failed.

ELEMENT 2.—"They must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing." Fry, p. 291.

Elements 1, 3 and 4 must also be found—Fry, p. 291—Warrington, L.J.

### *Payment of Rent.*

"For this reason payment of the purchase money alone is not sufficient to exclude the statute, although it is in part performance of the contract, [Element 1] be-



cause if the contract is not performed, the money can be recovered back by action. . . I think no distinction can be drawn between payment of rent and payment of purchase money": *per* Warrington, L.J., in *Chaproniere v. Lambert*, where payment of a quarter's rent was held not to be an act of part performance.

In *Thursby v. Eccles* (1901) 17 T. L. R. 130; 21 C. L. T. 58, Bigham, J., held that payment of rent in advance under a parol agreement for a lease was not part performance, and raised no equity except possibly a right to recover back the money paid.

### *Taking Possession.*

"But on the other hand, if possession is changed, the relation of the parties is changed, and the want of a memorandum cannot be set up, because an act has been done which cannot be reversed; and if possession could be recovered it could only be upon the terms of indemnifying the persons taking possession against any moneys expended or liabilities incurred by them in taking possession . . ." *per* Warrington, L.J., in *Chaproniere v. Lambert*.

A municipal corporation which entered upon lands—under an oral agreement for a lease with the right to take gravel from the lands—and had taken gravel with the knowledge and consent of the lessor, was granted specific performance in *Township of King v. Beamish* (1916) 36 O. L. R. 325; 30 D. L. R. 116 [App. Div.]; Meredith, C.J.O., discussing the question as to what acts amount to taking of possession, held that pedal possession was unnecessary in this case—that possession had been taken—and that it would be fraud in the defendant to set up the absence of agreement when possession had been given on the faith of it.

In *Bell v. Chartered Trust Co.: Chartered Trust Co. v. Bell & Bursey* [*ante*, p. 105], the tenant had gone into possession under a parol agreement for a lease: had expended money on fixtures and paid rent for nine months: held such part performance as to take the case out of the Statute of Frauds.

In *Fabrie v. Hewlemaus* [1919] 2 W. W. R. 146; 45 D. L. R. 744 [Alta.—Walsh, J.] the Court considered a verbal lease for three years on certain conditions, and it was held that taking possession was an act of part performance sufficient to enable the Court to decree specific performance.

In *Griffin v. Brunton* (1914) 6 W. W. R. 1034 [Sask.—Dist. Ct.] Doak, D.C.J., held that possession and payment of rent are not sufficient acts of part performance to support an alleged parol lease, where there has been no change in possession or in the amount of the rent, and the former tenancy being from month to month, would have continued indefinitely until terminated by notice.

This case distinguished *Nunn v. Fabian* (1866) L. R. 1 Ch. 35; 35 L. J. Ch. 140, where the tenant had paid rent at an increased rate, and it was held to be an act of part performance, taking the case out of the statute: and see *per* Baggallay, L.J., in *Humphreys v. Green* (1882) 10 Q. B. D. 148 at p. 156; 52 L. J. (Q.B.) 140; *Miller v. Sharp* [1899] 1 Ch. 622, and *Hodson v. Hewland* [1896] 2 Ch. 428; 65 L. J. Ch. 754, *per* Kekewich, J., at p. 533 (as to the difficulties in the way of obtaining specific performance when the plaintiff is in possession independently of the new lease—often an “insuperable” difficulty).

In *Biss v. Hygate* [1918] 2 K. B. 314; 119 L. T. 284; 87 L. J. K. B. 1101 [Div. Ct.], it was held, following *Hodson v. Hewland* (*supra*), that a continuance of possession unequivocally referable to an unsigned lease was part performance even when the tenant took possession antecedently to the making of the lease or the commencement of the tenancy.

ELEMENT 3.—“The contract to which they refer must be such as in its own nature is enforceable by the Court.” Fry, p. 291.

Specific performance is an equitable remedy, and will not be granted [1] if any condition precedent remains unfulfilled; [2] if the agreement is in any respect

uncertain; [3] if the order would have no good result; [4] if the plaintiff, the proposed lessee, is insolvent; [5] if to grant the lease would work a forfeiture, or [6] a hardship; [7] if the Court cannot superintend the performance of the contract; [8] if there has been delay in applying for the relief; [9] if the plaintiff in possession has broken covenants to be inserted in the lease so as to give the landlord a right of re-entry: 18 Hals. s. 826; [10] if the party seeking to enforce the agreement has repudiated it: *Crichtons Ltd. v. Green* (1915) 30 W. L. R. 793; 8 W. W. R. 224 [Lamont, J.]; [11] if the agreement is illegal, immoral or impossible of performance.

[1] *If any condition precedent remains unfulfilled.*

, See *Walker v. Kelly* (1873) 24 U. C. C. P. 174.

In *Brown v. Brown* (1912) 20 O. W. R. 986; 3 O. W. N. 543; 1 D. L. R. 228 [C.A.], affirming *Falconbridge, C.J. K. B.* (1911), 19 O. W. R. 447; 2 O. W. N. 1242, an agreement for a lease containing a clause that "these presents shall only come into force and effect provided the party of the second part obtains from the license department a substantial assurance that he will obtain a license for the said premises," was ordered specifically performed at the suit of the lessee, who had done all he could to have the license transferred from the lessor, the former licensee, when the lessor had not done his part in having the transfer made. The lessor was not to be allowed to take advantage of a condition the performance of which had been prevented by himself: *Roberts v. Bury Commissioners* (1870) L. R. 5 C. P. 310, followed, and *Hotham v. The East India Co.* (1787) 1 T. R. 638, referred to.

A lease was made to one J. by an indenture expressed to be under the Short Forms of Leases Act. By it a theatre was demised for 5 years from the 1st July, 1918, at a yearly rental of \$1,800, payable monthly in advance. There was in the lease a covenant on the part of the lessee that he would not assign or sublet without leave, and there was a proviso that the leave would not be unreasonably withheld. By deed, dated the 5th June,

1918, duly assented to by the lessors, the lease was assigned to M. T. L. In November, 1918, an agreement was entered into between G. and M. T. L. by which G. agreed to buy and M. T. L. to sell the lease and the vendor's equipment in the theatre for \$5,500. M. and C., the owners of the theatre, refused their consent to an assignment of the lease to G.

As M. T. L. were unable to procure the landlord's assent to the assignment, their claim against G. for specific performance failed; and the claim made against them for the return of the \$3,000 paid by G. succeeded: *Winter v. Demerque* (1866) 14 W. R. 281, 699. G.'s conduct, which led the landlords to believe that he would be an undesirable tenant, did not afford to M. T. L. any defence to G.'s claim for the return of money paid upon a consideration which had failed: *Grossman v. Modern Theatres, Ltd.* (1919) 45 O. L. R. 564; 16 O. W. N. 242 [Rose, J.].

[2] *If the agreement is, in any respect, uncertain.*

In *Grant v. McPherson* (1902) 1 O. W. R. 240 [Meredith, J.] refused specific performance as there was no consensus *ad idem*.

In *Dickson Co. v. Graham* (1913) 23 O. W. R. 749; 4 O. W. N. 670, 9 D. L. R. 813, Hodgins, J., held that there was no consensus *ad idem* in an action to establish an alleged agreement for a lease.

In *Bank of Nova Scotia v. McDougall & Secord* (1913) 4 W. W. R. 365; 23 W. L. R. 753; 11 D. L. R. 546 (Alta.—Ct. en B.), it was held, Simmons, J., dissenting, reversing the judgment of Harvey, C.J., that specific performance should be refused, the parties not being *ad idem*.

In *Gibbins v. Smith*, affirmed (1908) 12 O. W. R. 7 [Div. Ct.]; 11 O. W. R. 563, MacMahon, J., held that on the facts there was no agreement for a lease. See also *Crawford and Walsh v. C. W. Lindsay Co., Ltd.* (1920) 18 O. W. N. 254 [Middleton, J.].

In *Joseph v. Anderson & Macbeth Co.* (1907) 9 O. W. R. 482, [C.A.] affirming Britton, J. (1906) 7 O. W. R. 582, specific performance was refused of an agreement for a

lease by which the rent was to be fixed by a percentage on the cost of a building to be erected on the terms of the agreement contended for by the plaintiff, having regard to the actual cost of the building.

[3] *If the order would have no good result.*

Specific performance of an agreement to take a lease for 1 year was refused when 5 months had run when the action was brought, and the year was up at the time of the trial: *City of Toronto v. Mallon* (1903) 2 O. W. R. 933; affirmed (1904) 4 O. W. R. 386 [C.A.], citing Chitty, L.J.; *Glasse v. Woolgar* (1897) 41 Sol. J. 573.

“No one ever heard of granting specific performance even for a year”: *De Brassac v. Martyn* (1863) 41 W. R. 1020; *Lever v. Koffler* [1901] 1 Ch. 547; *Mara v. Fitzgerald* (1872) 19 Gr. 52.

[4] *If the plaintiff, the proposed lessee, is insolvent.*  
18 Hals. s. 826.

[5] *If to grant the lease would work a forfeiture; or*  
[6] *a hardship.*

18 Hals. s. 826.

[7] *If the Court cannot superintend the performance:*  
*e.g., of a building contract.*

18 Hals. s. 826.

[8] *If there has been delay in applying for the relief.*

In *Jarvas v. Tormey* (1909) 13 O. W. R. 432 [Anglin, J.] it was held that a delay of 8 months in commencing action and other minor circumstances, disentitled the plaintiff to specific performance, but damages for breach of the agreement were given.

[9] *If the plaintiff, in possession, has broken covenants to be inserted in the lease and so given a cause of re-entry.*

18 Hals. s. 826.

[10] *If the party seeking to enforce the agreement has repudiated it.*

*Crichtons Ltd. v. Green* (1915) 30 W. L. R. 793; 8 W. W. R. 224 [Sask.—Lamont, J.], was the case of a written agreement for a lease of a store and basement: the tenant entered into the store but could not get exclusive possession of the basement and so moved out. In an action against him for rent, it was held that the agreement would not be ordered to be specifically enforced.

See also *Moir v. Palmatier* (1900) 13 M. R. 34 [C.A.], citing *Cornwall v. Henson* [1899] 2 Ch. 712.

[11] *If the contract is illegal, immoral or impossible of performance.*

Illegal contract: *Van Buskirk v. McNaughton* (1896) 34 N. B. R. 125.

A lease executed on a Sunday is not so invalidated: *Duprat v. Daniel* (1902) 1 O. W. R. 561; 2 O. W. R. 940 [Div. Ct.], and see *Gray v. Shields* (1895) 26 N. S. R. 363; 15 C. L. T. 477.

ELEMENT 4.—“ There must be proper parol evidence of the contract which is let in by the acts of part performance.” Fry, p. 291.

#### *Specific performance with rectification.*

Since the passing of the Judicature Act, the Court has jurisdiction (in any case in which the Statute of Frauds is not a bar) in one and the same action to rectify a written instrument . . . and to order the agreement as rectified to be specifically performed: *Rudd v. Manahan* (1913) 4 W. W. R. 350 [Alta.—Ct. en B.], following *Olley v. Fisher* (1887) 34 Ch. D. 367; 56 L. J. Ch. 208; 55 L. T. 807.

*As between himself and his lessor.*

There is a difference where the rights of third parties intervene, for the right to specific performance applies only as between the parties to the contract: see *Brook v. Biggs* (1836) 2 Bing. N. C. 572; *Bird v. G. E. Ry. Co.* (1865) 19 C. B. N. S. 268; 34 L. J. C. P. 366.

#### DAMAGES.

Instead of suing for specific performance, any party injured by breach of an agreement to give or accept a lease may sue for damages, and this whether or not a case for specific performance could have been made so long as there is a contract enforceable at law: 18 Hals. s. 827; and see the notes to Article 19, p. 172, *post*.

In *Re Murray* (1902) 4 O. L. R. 418 [Boyd, C.]: A. leased a farm to his son for 5 years, with a provision for determination at the end of any year. He also undertook in the lease to build a house on the farm during the first year of the term. Eighteen months later the father died without having built and devised the farm to his son, making no mention of the lease. Held, that the agreement would not be ordered to be specifically performed—damages only would be given, and the son was not entitled to have the house built at the expense of the father's personal estate: *Cooper v. Jarman* (1866) L. R. 3 Eq. 98, and *In re Day* [1898] 2 Ch. 510, distinguished.

See also *McMillen v. Torrens* (1906) 40 N. S. R. 626.

## CHAPTER III.

### LEASES AND AGREEMENTS—REQUISITES OF.

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## LEASES AND AGREEMENTS DISTINGUISHED.

ARTICLE 12.—“Where an agreement to let is entered into but it appears to have been the intention of the parties that something further should be done to insure the interests of either party, such an instrument is not a present lease but a mere contract for a lease to be granted in future.”

[Authorities: *Kyle v. Stocks* (1870) 31 U. C. R. 47; *C. P. R. v. Toronto* (1902) 4 O. L. R. 134 [Div. Ct.]; (1903) 5 O. L. R. 717 [C. A.]].

### *The Difference Between a Lease and an Agreement.*

In *Canadian Pacific Ry. Co. v. City of Toronto* (1902) 4 O. L. R. 134 (Div. Ct.) Boyd, C., said at p. 143: “Now by the very terms of that agreement it is not self-contained, so to speak. It contemplates and provides for the execution of a lease to carry out the contract. In itself it is silent on the matter of taxes . . . .” And Moss, C.J.O., said [(1903) 5 O. L. R. 717 (C. A.)] at p. 719, “It was argued for the C. P. R. that the agreement was self-contained, and that there was no occasion or necessity for a further instrument or lease, in order to give effect to the contract between the parties. It seems manifest, however, not only from the terms of the agreement itself, but from the conduct of the parties, that a formal instrument of lease was contemplated.” This

case was affirmed by the Privy Council with a variation on another point [1905] A. C. 33, and see the first report, [1900] 27 A. R. 54 [C. A.].

Questions frequently arise as to whether a particular instrument constitutes a lease or an agreement only, and the principle resulting from the cases seems to be that when an agreement to let is entered into, but it appears to have been the intention of the parties that something further should be done to ensure the interests of either party, such an instrument is not a present lease but a mere contract for a lease to be granted in future, and where on Saturday premises were rented verbally for a year to one B. B. and it was intended to have a written lease, but on Monday the landlord put some one else in possession and refused to let B. B. in, after which the latter had nothing to do with it and there was nothing said about the terms of the lease, the amount of rent or how it was to be payable, nor was it shown that the terms had been agreed upon, it was held not a lease but an agreement only: *Kyle v. Stocks* (1870) 31 U. C. R. 47.

“Memorandum of agreement for lease. W. M. for the consideration hereinafter named agrees to demise and lease to D. H. these premises, etc., for the period of three years certain at ten shillings currency per day, payable monthly in advance during said term and with the privilege to said D. H. to hold the same for a further period of two years at the same rent payable as aforesaid. The said D. H. agrees to take the said premises from said W. M. for the price and terms aforesaid and to pay all taxes upon the said premises, possession to be given whenever the first monthly payment of rent is made.” D. H. having offered to pay the month’s rent in advance brought ejectment to obtain possession, and it was held that even admitting this to be a lease it could not be regarded as being for a term not exceeding three years from the making thereof, and so by the Statute of Frauds would require a writing, and therefore for want of a seal it could take effect only as an agreement to let: *Hurley v. McDonell* (1853) 11 U. C. R. 208: see Article 6.

A entered into an agreement in writing signed by him only as follows: "In consideration of £70 paid in hand by B., I hereby agree to sign a lease of lot No. 32 in the 2nd concession of Etobicoke, directly the same is drawn up by the solicitor in the following terms, namely: To let B. have the farm for seven years commencing from the 1st of April, 1848, at £70 per annum, the first payment having been this day paid by the said B. (the receipt being acknowledged), and the next payment on the 1st April, 1850, and so on. If B. wants to give up the farm before the expiration of four years he is to pay £140 to me, if after four years then £70. If I want to sell the farm then I am to pay B. on the same terms, six months' notice to be given to either party. I am also to put up a frame barn to be completed, etc., also a house, etc., also to split 4,000 rails and have them ready for hauling by the 1st January, 1848, and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, etc., and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off," and it was held that this instrument was not a lease creating a term of years, but an executory agreement: *McLean v. Young* (1850) 1 U. C. C. P. 62.

If a contract for a lease contain words of present demise ("doth agree to let, etc."), although to hold from a subsequent day, it will amount to a lease, notwithstanding a more formal lease is stipulated for, that being considered only as a further assurance: *Poole v. Bentley* (1810) 12 East 168; *Pinero v. Judson* (1829) 6 Bing. 206.

Where an agreement is made subject to a formal contract being prepared, it does not take effect until such contract is prepared. Where a written agreement to take a lease of a house was made for a certain term at a certain rent "subject to the preparation and approval of a formal contract," it was held that this without more did not constitute a binding agreement of which specific performance would be decreed: *Winn v. Bull* (1877) 7 Ch. D. 29; 47 L. J. Ch. 139.

Where an agreement for a lease contained in two letters included the clause "a proper lease to be drawn up with all proper clauses and approved of by me and my solicitor," it was held that the words approved by me and my solicitor did not prevent the letters forming a valid contract: *Eadie v. Addison* (1882) 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

An instrument containing an express proviso that it shall not operate as a lease but only as an agreement will be construed to be a mere agreement, notwithstanding it contains words of present demise: *Perring v. Brook* (1835) 1 Moo. & R. 510; 7 C. & P. 360.

But if it contains a clause to the following effect, viz.: "and it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants, and agreements to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed," and the tenant enters into possession under such agreement, the concluding stipulation will create an actual tenancy at a fixed rent, for which a distress may be made: *Anderson v. Midland Rail. Co.* (1861) 30 L. J. (Q. B.) 94; 3 E. & E. 614.

Where an agreement for a lease to contain certain specified covenants concluded thus: "and in the meantime and until such lease shall be executed to pay the said yearly rent and to hold the same premises subject to the covenants above mentioned," it was held that the latter words amounted to an actual demise: *Pinero v. Judson*, *supra*; *Rollason v. Leon* (1861) 7 H. & N. 73; 31 L. J. (Ex.) 96.

The defendant on the 11th November, 1905, rented a house from the plaintiff at \$30 a month, for one year, beginning on the 15th November, from which date rent was to be payable. The defendant did not move into the house and two months from the 15th November the plaintiff sued for two months rent. The Full Court held the transaction was not an agreement for a lease but an actual lease: *Smith v. Thomas* (1907) 2 E. L. R. 394 41 N. S. R. 216.

*Wolff v. McGuire* (1896), 28 O. R. 45; 16 Occ. N. 347. The landlord rented premises for a month and gave his tenant the following receipt: "Oct. 20, 1894, received from M. the sum of \$9 in full payment for rent of stable from the 25th Oct., 1894, to Nov. 25, 1894," and the tenant took possession. Held, that the receipt was a lease and not an agreement for a lease. See this case in the notes to Art. 15, p. 155, *post*.

A document by which the plaintiff "let to (the defendant) the house . . . at a weekly rental of 23s., and I agree not to raise (the defendant) any rent so long as he lives in the house and pays rent regular. I shall not give him notice to quit," was held to be in effect, an agreement for a lease to the defendant for life, and subject to the defendant electing to take specific performance of the agreement and paying arrears of rent, the plaintiffs' action to recover possession of the house, based upon a notice to quit, was dismissed: *Zimble v. Abrahams* [1903] 1 K. B. 577; (1903) 19 T. L. R. 189 [C. A.].

See also *Fabrie v. Heulemans* [1919] 2 W. W. R. 146 [Alta.—Walsh, J.] noted at pp. 15 and 110, *ante*.

## REQUISITES OF A VALID AGREEMENT FOR LEASE.

ARTICLE 13.—To be valid, an agreement for a lease must show [1] the commencement and [2] duration of the term, [3] the names of the parties, [4] a description of the property to be demised, and [5] all the material terms of the contract.

[Authorities: *Infra*, *Passim*].

This Article continues the discussion commenced in Article 10.

### [1] *The Commencement of the Term.*

"No date was fixed for the commencement of the term which rendered the agreement (apart at least from legislative sanction) inoperative," per Cartwright, M.C., in *C. P. R. v. City of Toronto* (1902) 4 O. L. R. 134, at p.

136: See this case referred to at p. 117, *ante*. The agreement was confirmed by statute and subsequently another agreement providing for the commencement of the term was entered into. It was held that rent ran from the date so fixed and not from the date upon which the title was first accepted by the lessees.

“Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds contain those elements,” per Lush, L.J., in *Marshall v. Berridge* (1881) 19 Ch. D. 233; 51 L. J. [Ch.] 329, followed in *Mitchell v. Mortgage Company of Canada* [(1919) 3 W. W. R. 324; 59 S. C. R. 90 (S. C. Can.); [1918] 3 W. W. R. 838; 43 D. L. R. 337 (C. A.—Sask.), where the term was to commence from “the completion of the repairs or when handed over to M.” It was held the commencement of the term was not made certain and *Oxford v. Provand* (1868) L. R. 2 P. C. 135; 5 Moo. P. C. 150, was distinguished.

An agreement that the lease was to be made at such time as the plaintiff “should move a drilling rig into this immediate vicinity” showed no definite time for the commencement of the lease and specific performance was refused: *Acme Oil Co. v. Campbell* (1907) 8 O. W. R. 627; 27 C. L. T. 52 [MacMahon, J.].

A tenancy for a term of years from March 25th commences at midnight on March 25-26: *Meggesson v. Groves* [1917] 1 Ch. 158; 86 L. J. (Ch.) 145.

It is not necessary that the agreement should expressly show the date at which the term is to commence, if it contain a reference to circumstances from which the date can be clearly ascertained: It will be sufficient if the time of commencement can be inferred, as for instance, if a day be fixed for the payment of the first rent: *Wesley v. Walker* (1878) 38 L. T. 284; 26 W. R. 368; or if it is connected with a prior writing by which a day is

fixed: *Wood v. Aylward* (1887) 58 L. T. 662 [C. A.]; see also *Cartwright v. Millar* (1877) 36 L. T. 398; *Carroll v. Williams* (1881) 1 O. R. 150.

There is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion: *Marshall v. Berridge* (*supra*), overruling *Jacques v. Millar* (1877) 6 Ch. D. 153; and see *Re Lander and Bagley's Contract* [1892] 3 Ch. 41; 61 L. J. [Ch.] 707.

A lessee of certain premises used as a factory having become insolvent, the lease was forfeited by the lessor, though at what particular time did not appear. The lessee continued in possession, and an arrangement was entered into whereby one F. agreed to purchase the machinery on the premises from the assignee in insolvency, giving the lessee the option to redeem it within two years. The latter obtained from the lessor an agreement as follows:—"Toronto, January 27th, 1880. In the event of Thomas Carroll continuing the occupation of buildings on Hayter street, I promise and agree to give a new lease at a rental of \$600 for five years. R. S. Williams." It was held that this agreement was not sufficient to satisfy the Statute of Frauds, as it did not appear from it when the term was to begin, nor when the prior lease was forfeited, or to whom the lease was to be given: *Carroll v. Williams*, *supra*.

Where the period for the commencement of the term is not shown in an agreement for a lease, the date thereof is not necessarily the date from which the term is to run. The date may be collected from the instrument as a whole, and where possession was to be given within a month from the date of the agreement, evidence was admitted to show that that was the commencement of the term: *Re Lander and Bagley's Contract* (*supra*); and *Marshall v. Berridge* (*supra*); and see *Boyd v. Naismith* (1909) 12 W. L. R. 233 [Sask.—Full Ct.].

## [2] *The Duration of the Term.*

The agreement should not only show the commencement but also the duration of the term: *Clarke v. Fuller*

(1864) 16 C. B. N. S. 24; *C. P. R. v. City of Toronto; Marshall v. Berridge and Mitchell v. Mortgage Co. of Canada*, *ante* p. 122.

In *Acme Oil Co. v. Campbell* (1907) 8 O. W. R. 627; 27 C. L. T. 52 [MacMahon, J.] the duration of the term was not stated and specific performance was refused.

*McLennan v. Wellington* (1897) 5 B. C. R. 345 [Full Ct.]. *Quære*, whether the agreement was not void under the Statute of Frauds as not stating the term.

### [3] *The Names of the Parties.*

“The words of the statute require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference. . . . The statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed,” per Younger J., in *Lovesy v. Palmer* [1916] 2 Ch. 233; 85 L. J. (Ch.) 481, noted at p. 103, *ante*.

The signature of the party to be charged must appear in the writings. An offer in writing to take a lease of a theatre, signed by the intended lessees and attested by the lessor’s agent, but not naming the lessor, and only addressed to him as “Sir,” followed by an acceptance in writing by the agent, addressed to and received by the intended lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the Statute of Frauds, so as to entitle the lessor to have the same specifically performed: *Williams v. Jordan* (1877) 6 Ch. D. 517; 46 L. J. (Ch.) 681.

*Carroll v. Williams* (1881) 1 O. R. 150, noted at p. 123, *ante*, should also be referred to.

To satisfy the statute it is immaterial that the parties named in the memorandum are in fact agents. Parol evidence is admissible to prove who are principals: *Pul-*



*ford v. Loyal Order of Moose* (1913) 5 W. W. R. 452; 23 M. R. 641; 25 W. L. R. 868 [C. A.], reversing (1913) 4 W. W. R. 63; 23 W. L. R. 525.

[4] *A Description of the Property to be Demised.*

The writing must state the name or other description of the property to be demised: *Price v. Griffith* (1851) 1 De G. M. & G. 80; *Haywood v. Cope* (1858) 25 Beav. 140.

But the description need not completely identify, for parol evidence is admissible to show the property intended: *Owen v. Thomas* (1834) 3 Myl. & K. 353.

An agreement for the lease of an identified gravel pit is not incomplete because a survey of it is to be made so as to insert a description by metes and bounds in the lease: *Township of King v. Beamish* (1916) 36 O. L. R. 325; 30 D. L. R. 116 [App. Div.].

In *Woodworth v. Lantz* (1910) 8 E. L. R. 60, the lessor was held estopped from saying that certain lands subsequently acquired were not intended to be in the agreement as he had represented they were his, and the defendant had acted thereon.

An agreement to let an estate of 437 acres, "except thirty-seven acres thereof," was held sufficient, for the lessor might elect which 37 acres should be excepted: *Jenkins v. Green* (1859) 27 Beav. 437; 28 L. J. [Ch.] 817.

E. agreed to pay B. \$300 if he would procure a lease of the premises then occupied by him under lease from one W. and adjoining E.'s premises, with the privilege of making a doorway between the two houses and assign the lease to him. At B.'s request E. wrote him the following letter:—"Dear Sir,—In reply to yours of to-day, I promise to give you \$300, provided you can give me a transfer lease with privilege to make an opening between your premises and my own. Cash to be paid on completion of transfer lease. This is as I understand it.—E." B. procured a lease and tendered an assignment of it to E., who refused to accept it, whereupon B. sued for the \$300. It was held that E.'s letter was a sufficient memorandum to satisfy the requirements

of the 4th section of the Statute of Frauds, and that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in B.'s discretion: *Bland v. Eaton* (1881) 6 A. R. 73.

[5] *All the Material Terms of the Contract.*

See *Toronto General Trust Co. v. Sabiston* (1919) 15 O. W. N. 333; 16 O. W. N. 167; 44 O. L. R. 639; 47 D. L. R. 324, the case of an agreement for a lease which provided that the rent to be paid was to be fixed by arbitration.

In the Articles dealing with specific performance of agreements for leases found at p. 107, *ante*, this question is considered.

## REQUISITES OF A VALID LEASE.

ARTICLE 14.—It is necessary that a lease should contain [1] proper parties, [2] words of present demise, [3] a description of the premises demised, [4] the commencement and [5] duration of the term and [6] the rent—if any—also [7] any covenants or conditions and exceptions or reservations.

[Authorities: *Passim*].

This Article also sets out what would require to be proved to establish a parol lease.

The premises of a deed are all the foreparts of the deed before the habendum: Touch. 75; 2 Bl. Com. 298.

### *Statutory Provisions.*

In Alberta and Saskatchewan the form of certain leases is prescribed by statute. See p. 94, *ante*, Article 5.

In Manitoba the statute dealing with leases of land under the Real Property Act is permissive.

*The Short Forms Acts.*

In Ontario, British Columbia, Nova Scotia and Manitoba there are what are called Short Forms of Indenture or Short Forms of Leases Acts which may be invoked or not at the option of the parties.

In 1845 Lord Brougham's administration passed the first Short Forms Act, 8-9 Vic. c. 124 (Imp.) "to facilitate" the conveyance and leasing of realty.

"The scheme of the Acts . . . is to authorize the use of certain forms of words which are set forth in the Acts, and are the short forms, and to give to these forms of words—when the instrument in which they appear is declared to be made in pursuance of the Act—the same effect as if other forms of words which are set forth in the Act had been used. The short forms are or are intended to be compendious expressions of what is contained in the corresponding long forms," per Meredith, C.J., in *Delamatter v. Brown Brothers Co.* (1905) 9 O. L. R. 351, at 354 [Div. Ct.].

"These short forms were adopted only for convenience. . . . They are not invested with any sanctity. They were not intended, like the statutory conditions of fire insurance, to be an expression of what the legislature considered as reasonable. They were for the convenience and not the restriction of parties in making their contracts. They could be used or not as the parties chose. They were as Mr. Justice Street puts it in *Clarke v. Harvey* (1888) 16 O. R. 159, 'symbols,' " per Magee, J., in *Delamatter v. Brown Brothers Co.* (*ante*).

The English Act was copied in Ontario in three Acts—those respecting Short Forms of Conveyances—now R. S. O. 1914 c. 115—Leases—now R. S. O. 1914, c. 116 and Mortgages—now R. S. O. 1914, c. 117, respectively.

Boyd, C., in *Argles v. McMath* (1895) 26 O. R. 224, at p. 230, says "But it has to be observed that the Ontario Act itself is of English origin, being an adaptation—almost an adoption of Lord Brougham's much criticised statute of 1845; 8 & 9 Vic. c. 124 Imp. . . ." And at 231 "It is another noteworthy matter that the

short forms of Lord Brougham so universally discredited by English conveyancers, have here formed the standard models everywhere used, though sometimes to the surprise of those who have not carefully estimated the scope of the statutory exponential covenants.”

The provinces of Manitoba, Nova Scotia and British Columbia have also “adapted” the Act. The British Columbia Act, R. S. B. C. 1911 c. 135, is almost a copy of the English Act, while the Manitoba Act, R. S. M. 1913 c. 181, is in its turn an adaptation of the Ontario Act as is the Nova Scotia Act (1912) 2 Geo. V. c. 2.

In Alberta and Saskatchewan the Real Property Act Stat. 1906 c. 24, s. 55 and the Land Titles Act Stats. 1917 (Sess. 2), c. 18, s. 93, respectively provide for certain short forms. See Appendix A. p. 1097, *post*.

These Acts also provide that in every lease of lands under the Acts certain powers are to be implied. These will be considered at p. 162, *post*.

“In order to provide for cases in which the long forms would not accurately express the terms which the parties to the instrument may desire to embody in it, they are by the Act, . . .” permitted to make substitutions and exceptions: see per Meredith, C.J., in *Delamatter v. Brown Brothers Co.* (*ante*). These are dealt with (*post*) p. 1103.

“ . . . In order that the Act should operate on the words used two things must occur: (1) that the lease should be made in pursuance of the Act, and (2) that the very words of the short forms should be used, except where deviations from them are authorized by the Act, and the provisions of the Act as to the deviations are complied with,” per Meredith, C.J., in *Delamatter v. Brown Brothers Co.* (*ante*).

The variations in the statute of the different provinces are somewhat numerous and the statute and schedules will be discussed seriatim — using the Ontario Statute as the frame work for the arrangement of the subject. See Appendix A, p. 1097, *post*.

The Act applies only to leases under seal and a lease not under seal expressed to be made pursuant to the Act

is not under the Act: *Alexander v. Herman* (1911) 3 O. W. N. 755; 21 O. W. R. 461; 2 D. L. R. 239.

The parties to a lease made under the Act "may introduce into [or annex to] any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column." [R. S. O. 1914 c. 116, s. 3 (3) from which the above is taken: R. S. B. C. 1911 cap. 135, s. 2 (4); R. S. M. 1913 cap. 181, s. 11 (*part*); 8-9 Vic. c. 124, s. 2 (4) Imp.].

It was held in *Delamatter v. Brown Brothers Co.* (1905) 9 O. L. R. 351 [Div. Ct.], Magee, J., dissenting, that this clause was not intended to authorize the introduction or annexation of words designed to enlarge the operation of the covenant to which they are added, and that as the added words were not an exception to or qualification of the short forms within the meaning of the Act the words actually used had to be construed in their ordinary sense without the aid of the extended form. This case is discussed *post*, p. 1103.

The Manitoba Act has also a section [R. S. M. 1914 c. 181, s. 9], reading as follows: "Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions therefrom, or other express qualifications thereof, respectively, or may extend them or remove therefrom any limitations, and the like exceptions or qualifications, or extension, or removal of limitations shall be taken to be made from or added in the corresponding forms in the second column."

"Any lease or part of a lease which fails to take effect by virtue of the Short Forms Act shall nevertheless be as effectual to bind the parties [A] as if the Act had not been passed. [R. S. O. 1914 c. 116, s. 4; R. S. B. C. 1911, c. 135, s. 6; R. S. M. 1913, c. 181, s. 3; 8 & 9 Vic. c. 124, s. 4]."

The Manitoba section has at [A] the words, "as far as the rules of law and equity will permit."

[1] *Proper Parties.*

The document, to be a valid lease, must show both a lessor and lessee: *Warner v. Willington* (1856) 3 Drew. 523; 35 L.J. [Ch.] 662; *Williams v. Jordan* (1877) 6 Ch. D. 517; 46 L. J. Ch. 681.

But it is sufficient if the identity of the parties can be ascertained from some other memorandum connected by clear reference with the document in question. All that is required is identification, and when there are two persons of the same name parol evidence would be admissible to show which was intended: *Catling v. King* (1877) 5 Ch. D. 660; 46 L. J. [Ch.] 384.

See also the cases as to agreements for leases at p. 124, *ante*.

Leases by agents are considered at p. 25, *ante*.

[2] *Words of Present Demise.*

The intention to demise must be disclosed, but no particular form of words is necessary to create a lease.

Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for a determinate time, whether they run in the form of a license, covenant or agreement, are in themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose: *Roan v. Kronsbein* (1886) 12 O. R. 200; *Bacon v. Campbell* (1879) 40 U. C. R. 517.

The appropriate words in a lease for life or years are "demise, grant and to farm let," but the word "demise" is an effective word to convey a freehold, and is of like import with and equivalent to the word "grant." An estate for life was, therefore, held to be validly created by the words "demise and lease" to the grantee for life, and livery of seisin was held unnecessary: *Spears v. Miller* (1881) 32 U. C. C. P. 661.

As to the significance of the word "demise," see p. 153, *post*—Implied Covenants—Article 15.

The words "agrees to let or hire" are words of present demise when they are not coupled with other words which show that it was not intended to give them that effect, and when it is plain that no future lease was contemplated, they will operate as a present demise: *Cumming v. Hill* (1838) 6 U. C. Q. B. O. S. 303, noted at p. 384, *post*.

See also *Grant v. Lynch* (1856), 6 U. C. C. P. 178; 14 U. C. R. 148; *Becher v. Woods* (1866) 16 U. C. C. P. 29; *Fairbairn v. Hilliard* (1867) 27 U. C. R. 111.

Care must be taken not to make the instrument to the lessee "his heirs and assigns." These words are appropriate to the grant of a fee simple, and such estate may pass though the instrument contain some essentials of a lease: *McDonald v. Gillis* (1866) 26 U. C. R. 458.

For the Statutory Forms of words see Appendix A, pp. 1097, and 1100.

Possession and the right to possession are dealt with at p. 172, *post*.

### [3] *A Description of the Premises Demised.*

See the cases dealing with descriptions necessary in agreements for leases, p. 125, *ante*.

The lease should describe the property demised. Where qualifying expressions, such as "be the same more or less," are introduced, they will only cover a reasonable deviation from the description: *Davis v. Shepherd* (1866) L. R. 1 Ch. App. 410; 35 L. J. [Ch.] 581.

"In general all things which are on the premises for the purpose of making and which do make them fit as premises for the particular purposes for which they are used will pass by a demise of the premises as such": *Tyne Boiler Works v. Longbenton* (1886) 18 Q. B. D. 81. 55 L. T. 825, per Esher, M.R.

Anything obviously necessary for the enjoyment of the thing demised will also pass with it over other property of the lessor. Thus the use of a drain: *Ewart v. Cochrane* (1861) 4 Macq. 117; the use of a coal chute and water pipes: *Hinchliffe v. Kinnoul* (1838) [Earl] 5

Bing. N. C. 1; 8 L. J. (C. P.) 105; the use of an artificial water course: *Watts v. Kelson* (1870) L. R. 6 Ch. App. 166; 40 L. J. [Ch.] 126, and the right to support: *Shubrook v. Tufnell* (1882) 9 Q. B. D. 621; 46 L. T. 886; [C. A.], but the most important of them is a way by necessity: *Osborn v. Wise* (1837) 7 C. & P. 761, which is a means of approach to the premises granted either by an undefined way, *Brown v. Alabaster* (1887) 37 Ch. D. 490, or by such a way as may be defined and selected by the grantor: *Bolton v. Bolton* (1879) 11 Ch. D. 968.

The demise of a floor or a room or an office bounded in part by an outside wall *prima facie* includes both sides of that wall: *Carlisle Cafe Co. v. Muse Brothers & Co.* (1897) 77 L. T. R. 515; *Hope Brothers, Limited v. Cowan* [1913] 2 Ch. 312; *Goldfoot v. Welsh* [1914] 1 Ch. 213; *G. Tamblyn, Limited v. Austin* (1920) 48 O. L. R. 97; 18 O. W. N. 357 [Kelly, J.], and where there was not in a demise any exception or reservation excluding the application of this rule, the tenant was held entitled to restrain his landlord from using the exterior wall of his store for the purpose of erecting a stairway.

*Seeley v. Kerr* [1909] 4 N. B. Eq. 184, 261; 40 N. B. R. 8, reversed [1911] 44 S. C. R. 629. A lessee under lease from the City of St. John of a water lot in the harbour, is *not* a riparian owner, and has no rights in respect of the water lot other than those given him by his lease. Hence, he could not restrain the lessee of the adjoining water lot from erecting a wharf on same which would prevent access to his lot from the south—a right of access not provided for in his lease.

Parcel or no parcel is a question of fact, and it may be shown by parol evidence what was and what was not included in a description, such evidence being always admissible to prove all the circumstances necessary to place the Court, which has to construe an instrument in the position of the parties to it, thus enabling it to judge of the meaning of the instrument: *Baird v. Fortune* (1861) 4 Macq. 127; *Magee v. Lavell* (1874) L. R. 9 C. P. 107; *Burgess v. Denison*, *post*; *G. Tamblyn, Limited v. Austin* (*supra*).



But however general a description may be, if all its terms fit some particular property, it must not be construed to take in anything but that property: *Webber v. Stanley* (1864) 33 L. J. (C. P.) 217.

A lease demised "that certain frame house now standing and being on lot number ten," etc., "and being that house now occupied by him (the lessee), also the use of half of the barn standing on said lot for the use of his two cows," and the lessee covenanted to keep up fences, it was held that the whole of lot ten could not be held to pass under the lease. That would be contrary to the general principle that a demise of the land passes the house which is on the land, while the demise of a house merely will not pass the field, lot or farm on which it stands; though a demise of the house "with the appurtenances" will pass the house with the orchard, yard and garden, but not the land generally. Here there was an express grant of the use of half the barn on the lot, and this was inconsistent with the idea that the whole of the lot was to go with the house: *McPherson v. Norris* (1855) 13 U. C. R. 472.

There was a lease of a lot of land "known as the park in front of Denison Terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas Street on the south, to be bounded on the east by the garden fence of my old cottage, and on the west by McGregor's garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by my carpenter, and which cottage is to go in the bargain with the land." It appeared that the garden fence extended only part of the way to the drive from Dundas Street, and the dispute was as to the eastern boundary beyond it. The Court held that the lessee was not, therefore, entitled to claim to the eastern boundary of all the land known as the park; but that this being a latent ambiguity, parol evidence was admissible to ascertain what was intended by the parties: *Burgess v. Denison* (1866) 16 U. C. R. 457.

A lease of a building *eo nomine* merely is a lease of the land on which it stands: *Renalds v. Offitt* (1857) 15 U. C. R. 221.

In a lease of "Sutherland's farm, being the west part of lot No. 15 in the 4th concession of West Zorra, as at present occupied by the said Sutherland," for eight years, at a yearly rent, it was provided that the lessee should not cut down timber for the purpose of clearing outside the brush fence, but might clear all within, and might use all the woodland on the said leased premises for pasture, and "that the said lessor shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent or any consideration therefor." The lessor having improved and built upon a portion of the land outside of the brush fence during the term, it was held that he was entitled to retain possession thereof: *Leonard v. Sutherland* (1860) 19 U. C. R. 301.

By the Ontario Conveyancing and Law of Property Act, R. S. O. 1914 c. 109, s. 15 (1) "every conveyance of land, unless an exception is specially made therein, shall include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, under-woods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to such land belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee simple also the reversion or reversions, remainder or remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same land, and every part and parcel thereof, with their and every of their appurtenances."

By s. 15 (2) "except as to conveyances under former Acts relating to short forms of conveyances, this section shall apply only to conveyances made after the 1st day of July, 1886."

*Similar Legislation.*

New Brunswick: C. S. N. B. 1903 c. 152, s. 21.

See also p. 125, *ante*.

[4] *The Commencement of the Term.*

See the cases dealing with agreements for leases: p. 121, *ante*. Article 13.

A lease for years may be made to commence either presently or at a future period at a day to come, as at Michaelmas next, or at three or ten years after, or after the death of the lessor or of J. S.: *Shep. Touch.* 273; *Goodright v. Richardson* (1789) 3 T. R. 462; Bac. Abr. tit. Leases (K.); or at the end of a previous term of years which is still subsisting: 1 Roll. Abr. 849; *Smith v. Day* (1837) 2 M. & W. 684; *Blatchford v. Cole* (1858) 5 C. B. N. S. 514; 28 L. J. [C. P.] 140.

Though a lease may be made to commence at a future day, yet if that day be more than three years from the making of the lease, it would formerly, as has been seen, be void as a lease unless by deed. But this is now otherwise: see p. 99, *ante*.

A lease to commence upon the expiration of a previous lease conveys only an *interesse termini* until the expiration of the previous lease, and does not amount to an assignment of the reversion expectant on such lease: *Smith v. Day*, and *Blatchford v. Cole* (*supra*); *Lock v. Furze* (1866) L. R. 1 C. P. 441; 35 L. J. [C. P.] 141.

So where a sublessor granted to his sublessee the residue of the term to commence when the sublease expired, this was held not to create an assignment of the residue, but only an *interesse termini*: *Hyde v. Warden* (1877) 3 Ex. D. 72; 47 L. J. [Q. B.] 121 [C. A.].

R. G. being seized in fee by an instrument purported to lease to his daughters "three acres with the right of way to a well, including an orchard and dwelling house, after the decease of his beloved wife J. G., to hold to his daughters for and during their lives or the life of the survivor of them, at the yearly rent of 20 cents, if demanded." There was no formal habendum in the lease

commencing at a future day, or on the wife's death, but it was held that a term was at once created in the whole three acres, the wife retaining the right to occupy during her life the house and orchard: *Wilson v. Gilmer* (1882) 46 U. C. R. 545.

A date is not absolutely necessary to a lease. When by deed it takes effect from the time of delivery, when there is no date or an impossible or uncertain one: *Styles v. Wardle* (1825), 4 B. & C. 908.

Even where there is a date, either party may give parol evidence that the date is false and then the lease will operate from delivery only: *Steele v. Mart* (1825) 4 B. & C. 272.

In the case of an actual demise without any condition preventing it from taking immediate effect, the date of the instrument would be the date from which the term should commence: *White v. McMahon* (1886) 18 L. R. Ir. 460; *Doe v. Benjamin* (1839), 9 A. & E. 644.

The term will commence from the day the lease is made and not from entry, provided it contain no stipulation to the contrary: *Prosser v. Henderson* (1861) 20 U. C. R. 438.

But a letting by parol will in the absence of evidence to the contrary be considered to commence from the day of the tenant's entering, and not with reference to any particular quarter day: *Kemp v. Derrett* (1814) 3 Camp. 510.

A lease was dated 25th March, 1783, habendum "from the 13th March now last past," and it was proved that the deed was not executed until some time after the date; it was held that the term commenced on the 25th March, 1783, and not in 1782, thus making the execution and delivery the day of commencement: *Steele v. Mart* (*supra*).

The time of the execution is material in reference to the operation of the covenants, for the tenant will not be liable for breaches of covenant committed after the date if before delivery: *Shaw v. Kay* (1847) 1 Exch. 412; 17 L. J. Ex. 17; *Jervis v. Tomkinson* (1856) 1 H. & N. 195, 206; 26 L. J. Ex. 41.

If the lease be dated and is to commence from the making hereof, or from henceforth, it takes effect from delivery: Co. Lit. 46 (b); *Styles v. Wardle* (1825) 4 B. & C. 908; or from the execution of a former lease, and no such lease in fact exists, or if the prior lease be void in law: *Miller v. Manwaring* (1635) Cro. Car. 397.

A lease provided that the lessee should have the right of purchasing the leasehold property upon his desiring to do so, "within the period of two years after the date of the commencement of the term" (the 1st of April, 1852). On the 1st of April, 1854, the desire of purchasing was declared and a tender of the purchase money made, and it was held that the tender was within time, the day of the commencement of the term being exclusive: *Sutherland v. Buchanan* (1862) 9 Gr. 135.

A lease consisting of seven sheets and bearing date March 15th, 1862, demised certain premises to W. On the 21st July following this lease was cancelled by an instrument under seal, the second and fourth sheets were taken out and replaced by others and it was re-executed and re-delivered without any other alterations. As it then stood it was dated as before to hold "from the first day of April now next" for nine years "from thence next ensuing, at a yearly rent payable in advance, that is to say, on the 1st April, 1862, and on the 1st April in each year during the term," conclusion being that the parties had thereunto set their hands and seals "the day and year first above written." It was held that the lease took effect from the delivery on the 21st July, 1862, not from the date, and that the term began on the 1st April, 1863, that the first year's rent payable "in advance" was not due until that day, the words "that is to say, on the 1st April, 1862," being merely a *falsa demonstratio*, though under them the term would commence on 1st April, 1862: *Bell v. McKindsey* (1864) 23 U. C. R. 162; 3 E. & A. 9.

The legal delivery will not be till payment of the consideration is made, if the deed is to take effect only on payment: *Oliver v. Mowat* (1873), 34 U. C. R. 472.

But *prima facie* the deed takes effect from the date.

An action was brought for seizing A.'s goods on 1st October, 1870, for rent due by one W. B. to W. H., the goods being on the demised premises. A. alleged that W. H., after the demise by deed bearing date 30th October, 1868, granted to A. in fee the lands in question whereby A. became entitled to the rent from W. B., and at the time of the distress W. H. had no interest in the lands; it was held that it was sufficiently shown that the reversion had been transferred before the distress, for the deed must be assumed to have been delivered on the day it bore date: *Hayward v. Thacker* (1870) 31 U. C. R. 427. But this *prima facie* presumption may be rebutted: see *Meagher v. Coleman* (1880) 13 N. S. R. 271, and the cases already considered.

A written agreement to let certain premises was dated the 20th December, 1872, but specified no date for the commencement of the term. The rent was, however, payable quarterly, "the first payment to be on the 25th of March next," and it was held that the tenancy commenced on the usual quarter day, 25th December, 1872: *Sandill v. Franklin* (1875) L. R. 10 C. P. 377; 44 L. J. [C. P.] 216.

#### [5] *The Duration of the Term.*

See the cases dealing with agreements for leases, p. 123, *ante*.

"It is indispensable to the creation of a term that its duration should be prefixed and certain from the beginning, and not fluctuating or uncertain according as certain contingencies may or may not happen": *Trust and Loan Co. v. Lawrason* (1882) 10 S. C. R. 679, per Strong, J., at p. 706, also noted at p. 9, *ante*.

The duration of leases for years ought to be ascertained, either by the express limitation of the parties at the time of making or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void: *Bac. Abr. tit. Leases* (L. 3).

It has already appeared [Article 1, p. 9, *ante*] that "the best way to make a lease for an optional number of

years is to grant for the longest term, giving to the lessor or lessee, or both, as may be agreed on, the right to determine the term on certain notice, or by some other act at either of the shorter periods": *Trust and Loan Co. v. Laurason* (*supra*); and see *Higgins v. Longford*, noted at p. 140, *post*.

So long as the lease has a certain beginning and a certain ending, 1 Step. Com. (11th Ed.) 144; Shep. Touch 267-272, the length of the terms or their peculiar limitations do not seem to be material. Thus a lease may be made for seven years and afterwards from year to year: *Brown v. Trumper* (1868) 26 Beav. 11.

A demise made for "one year certain, and so on from year to year," will create a tenancy for two years at the least: *Doe v. Green* (1839) 9 A. & E. 658; *Doe v. Geekie* (1844), 5 Q. B. 841. A demise "for six months, and so on from six months to six months until determined by either party," will create a tenancy for one year at the least: *R. v. Chawton* (1841) 1 Q. B. 247. So a demise may be made from two years to two years, or from three years to three years, or the like: *Hemming v. Brabason* (1660) 2 Lev. 45.

The notice must end with the stipulated period according to the terms of the lease and not at any other time: *Cadby v. Martinez* (1840) 11 A. & E. 720; *In re Magee & Smith* (1895) 10 M. R. 1; 5 W. L. T. 97.

A lease "for seven, fourteen or twenty-one years, as the lessee shall think proper," upon which the lessee enters and continues in possession, is a good lease for at least seven years and not void for uncertainty: *Ferguson v. Cornish* (1760) 2 Burr. 1032; and see *Laba v. McGovern*, noted at p. 963, *post*. But the lessee alone has the option to determine such a lease at the earliest periods, on the ground that every doubtful grant must be construed in favor of the grantee: *Dann v. Spurrier* (1803) 3 B. & P. 399.

If the option be given expressly to either party the lease may be determined by either or by his representative entitled to the reversion or term: *Goodright v. Mark* (1815) 4 M. & S. 30; *Bird v. Baker* (1858) 1 E. & E. 12.

A term may be limited conditionally, as "for one year and so from year to year," unless notice is given to the contrary: *Higgins v. Longford* (1871), 21 U. C. C. P. 254; or for 21 years if the lessee or some other person therein named shall so long live: *Hughes' Case* (1630) 13 Co. R. 66; *Brudnel's Case* (1592) 4 Co. R. 9 (a); *Trust and L. Co. v. Lawrason*, ante p. 9.

Where a lease was made for 40 years, if the lessor's wife or any of their issue should so long live, it was held to continue till all were dead, but if the limitation had been while the "wife and issue" should live, the death of any of them would put an end to the term: Co. Lit. 225 (a).

But if the term is not limited for a certain time, but generally as during the coverture of A. and B., this will create but a tenancy at will by reason of the uncertainty of the duration of the coverture: Bac. Abr. tit. Leases (L. 3).

But such leases become on payment of rent tenancies from year to year: *Reeve v. Thompson*, post, p. 142.

Where the demise is "so long as the lessor has power to let," this introduces an uncertainty and prevents the lease from conferring any particular estate greater than from year to year: *Wood v. Beard* (1876) 2 Ex. D. 30; 46 L. J. Q. B. 100 [C. A.].

Terms last during the whole anniversary of the day from which they are granted. Thus a term for one year, commencing on the 1st of October in 1894, lasts during the whole of the 1st October, 1895: *McCallum v. Snyder* (1860) 10 U. C. C. P. 191; see also *Sutherland v. Buchanan*, noted at p. 137, ante. In *Sidebotham v. Hol-land* [1895] 1 Q. B. 378; 64 L. J. [Q. B.] 200; 11 T. L. R. 154 [C. A.], it was held immaterial whether the tenancy commences on or from a certain day, etc., and where a tenancy commences on the 19th May, a six months' notice to quit expiring on 19th May, was held sufficient, though the proper notice would be for the 18th, the last day of the tenancy.

See also pp. 191 and 773, post.



*The Habendum.*

The habendum is that part of the lease which begins with "to have and to hold." Its office is to limit with certainty the estate, it may also abridge or alter the generality of the premises: *Shep. Touch.* 75.

Its operation as a grant is merely prospective from time of the execution of the lease. The term is then first created, but the duration of it is to be computed from the day in that behalf mentioned in the habendum: *Jervis v. Tomkinson* (1856) 1 H. & N. 195, 206; 26 L. J. [Ex.] 41; *Shaw v. Kay* (1847) 1 Exch. 412; 17 L. J. [Ex.] 17.

Where in the premises there is an express grant of a life estate *in praesenti* it will control the habendum which purports to grant the estate *in futuro*: *Boddington v. Robinson* (1875) L. R. 10 Ex. 270.

A demise by indenture to the lessee of certain land liable to be overflowed by a mill pond, to hold so long as the land should be thenceforth occupied and overflowed as a mill pond, is not void for uncertainty in reference to the duration of the term: *Kerr v. Bearinger* (1869) 20 U. C. R. 340.

When the date of the lease is different from the period fixed in the habendum for the duration of the term, the latter governs and notices to quit must be given accordingly: *Bird v. Baker* (1858) 1 E. & E. 12; 28 L. J. (Q. B.) 7.

A lessor executed what purported to be a statutory lease, at a yearly rent of 20 cents, of certain lands therefore conveyed by the lessee to the lessor. Before the conveyance the lessee had made a lease of the land to one George Thompson, and in the lease now taken by the lessee the habendum was "during the term of occupancy as tenant of the lessee of said George Thompson of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing, and fully to be complete and ended as soon as the said George Thompson shall vacate said premises or cease to reside thereon." It was held that this did not operate as a lease for years, owing to the uncertainty of the ter-

mination thereof, but would be a tenancy at will until payment of rent, when it would be a tenancy from year to year, and also might be deemed an agreement fixing the annual value of the premises at 20 cents, which the lessee should collect from Thompson and pay over to the lessor: *Reeve v. Thompson* (1887) 14 O. R. 499.

The habendum in a lease was "for the term of one year, and so from year to year unless notice is given to the contrary, or equitable proceedings taken on the mortgage hereinafter mentioned," and it was held that the filing of a bill to foreclose the mortgage put an end to the tenancy: *Higgins v. Longford* (1871) 21 U. C. C. P. 254.

So a lease may be made to take effect on the happening of a future event, as when the lessee pays rent and not before: *Hurley v. McDonell* (1853) 11 U. C. R. 208; or it may be limited to take effect at a future day: *Clarke v. Serricks* (1851) 2 U. C. R. 535; *Marr v. Watson* (1847) 4 U. C. R. 398; *Brown v. Blackwell* (1874) 35 U. C. R. 239.

See also *Dalye v. Robertson* (1860) 19 U. C. R. 411.

The habendum in a lease was for the term of one year from a certain date. The covenant for quiet enjoyment was followed by a proviso that either party might terminate the lease at the end of the year on giving 3 months written notice prior thereto. Held, that the proviso was clearly repugnant to the habendum and must be rejected: *Weller v. Carnew* (1898) 29 O. R. 400; 17 Occ. N. 178 [MacMahon, J.].

#### [6] *The Rent—if Any.*

As has been seen no rent need be reserved: p. 1, *ante*.

Rent is defined in Article 33 *et seq.*, p. 255, *post*, and see as to rent generally, pp. 255, *et seq.*, *post*.

#### *The Reddendum.*

The reddendum is that part of the lease which usually commences with the words "yielding and paying." [See Appendix A, p. 1097, *post*]; but these words are not

essential. Any expressions showing the intention of the parties that a rent shall be payable will be a sufficient reservation: *Gilb. Rents*, 30, 33; *Doe v. Kneller* (1829) 4 C. & P. 3.

### *Reduction or Abatement.*

See Articles 41 and 42, *post*.

Rent is payable at the end of the year when reserved generally. See Article 38.

In a lease the habendum was for 94  $\frac{1}{4}$  years and the reddendum for 91  $\frac{1}{4}$ . There was a counterpart executed by the lessee at the same time, and it was held that the lease and counterpart might be considered one instrument and the latter looked to in order to ascertain where the mistake lay. In the counterpart the habendum and reddendum were both 91  $\frac{1}{4}$  years, and it was held that as the lease contained a palpable mistake it must conform to the counterpart. Where there is only one instrument the habendum would be the dominant part and the reddendum would be subordinate, if there were any inconsistency between the two: *Burchell v. Clark* (1876) 2 C. P. D. 88; 46 L. J. (Q. B.) 115 [C. A.]; *Matthews v. Smallwood* [1910] 1 Ch. 777-784.

### [7] *Any Covenants or Conditions.*

Implied covenants are dealt with in Article 15.

For "Usual" covenants see Article 16.

For negative covenants see Article 114.

### *Joint and Several Covenants.*

Whether a covenant be joint or several is a question of intention to be collected from the words used and the nature of the estate and interest of the parties: *Bradburne v. Botfield* (1845) 14 M. & W. 559; *Palmer v. Mallett* (1887) 36 Ch. D. 422 (C. A.).

If the interest of the covenantees is joint the covenant will be construed as joint: *Anderson v. Martindale* (1801) 1 East, 497; *Foley v. Addenbroke* (1843) 4 Q. B. 197; *Pugh v. Stringfield* (1857) 3 C. B. N. S. 2.

If the interest of the covenantees is several, the covenant will be construed as several: *Withers v. Bircham* (1824) 3 B. & C. 54; *Servante v. James* (1829) 10 B. & C. 410; *Poole v. Hill* (1840) 6 M. & W. 835.

If, however, the words of a covenant are expressly and clearly joint, the covenant will be so construed although the interest is several and *vice versa*: *Sorsbie v. Park* (1843) 12 M. & W. 146; *Lee v. Nixon* (1834) 1 A. & E. 201.

And see an Article in (1909) 29 C. L. T. at p. 751

### *Dependent or Independent Covenants.*

It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor: *Newson v. Smythies* (1858) 3 H. & N. 843. A. by deed, in consideration of the rents, etc., on the part of B. to be paid and performed, agreed with B. that he would on or before the 1st day of October, upon request to him in writing by B., grant a lease, and A. thereby agreed to deliver to B. on 1st October, 200,000 staves, and it was agreed that the lease should contain a covenant by A. that he would deliver to B. in each of two succeeding years staves, etc., and it was held that a request by B. for, or the granting by A. of such lease was not a condition precedent to the right of B. to have the staves delivered, the covenants to grant the lease and deliver the staves being independent: *Leonard v. Wall* (1855) 5 U. C. C. P. 9.

Whether covenants are to be considered as dependent or independent is to be determined by the intention of the parties as it appears in the instrument. Where, therefore, a lease gave the lessee the option of purchasing the fee simple and the lessee assigned the lease on condition that the assignees before, or at the time of executing the conveyance to them of the fee simple would secure to the wife of the lessee a certain rent upon all the minerals that the assignees might take from the lands, it was held that securing the rent was not a condition precedent to the

assignees taking or exercising any rights under the assignment: *Albert Brick, etc., Co. v. Nelson* (1888) 27 N. B. R. 276.

No precise technical words are required in a deed to make a stipulation a condition precedent or subsequent, neither is it important in what order the clauses are placed. The determination of the question depends upon the nature of the contract and the acts to be performed by the contracting parties and any subsequent facts which have happened in consequence of the contract: *Hotham v. East India Co.* (1787) 1 T. R. 645; *Newson v. Smythies*, *supra*; *Thistle v. Union Forwarding Co.* (1880) 29 U. C. C. P. 76. Where a covenant is part only of the consideration on one side it is an independent covenant and not a condition precedent: *Carpenter v. Cresswell* (1828) 4 Bing. 409. If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant: *Boone v. Eyre* (1779) 2 W. Blac. 1312; *Pordage v. Cole* (1668) 1 Wms. Saund. 548 Ed. 1871; *Macintosh v. Midland C. R. Co.* (1845) 14 M. & W. 548; *London G. L. Co. v. Chelsea* (1860) 8 C. B. N. S. 215. Where a contract was made to grant a lease upon payment of £1,440 by certain instalments at stated times, the granting of the lease was held not a condition precedent to the right to recover the money: *Baggallay v. Pettit* (1859) 5 C. B. N. S. 637; 28 L. J. (C. P.) 169.

In a lease of certain premises for three years from 1st of May, the lessee covenanted that on or before said 1st of May he would give to the lessor two good and sufficient securities for the performance of the covenants in the lease on his part, and it was held that the giving of such securities was a condition precedent to the lessee's right of possession under the lease, the agreement to give possession being dependent upon the performance by the lessee of his part of the contract: *Murphy v. Scarth* (1858) 16 U. C. R. 48. Where A. covenanted to pay an annuity to B., who covenanted for the assignment and quiet enjoyment of the premises, the entering into which

covenants was the consideration, it was held that they were not dependent: *Rose v. Poulton* (1831) 2 B. & Ad. 822. On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him; it was held that the appointment of a fit and proper person was a condition precedent to the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him: *Lawton v. Sutton* (1842) 9 M. & W. 795. See also *Ward v. Hall* (1899) 34 N. B. R. 600, where covenants to renew or pay for improvement were held to be independent. An assignee of a term in coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of the premises, pay to the lessors the rent payable by the original lease, and would keep the lessee harmless and indemnified against the rents and covenants of the lease; it was held that the words "so long as he should be in receipt of the rents" did not extend to the covenant to indemnify: *Crossfield v. Morrison* (1849) 7 C. B. 286. Where a lessee covenanted to plough, sow, manure and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that it amounted to a covenant not to plough the sheep-walk: *St. Albans v. Ellis* (1812) 16 East 352. Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses; it was held that this was an implied covenant also that he would burn lime at all such seasons: *Shrewsbury v. Gould* (1819) 2 B. & Ald. 487. So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep: *Webb v. Plummer* (1819) 2 B. & Ald. 476.

*Illegal Covenants.*

A covenant to do a thing which on the face of it appears to be prejudicial to the public interest or otherwise contrary to law, is absolutely void: *Collins v. Blantern* (1767) 2 Wils. 341; *Windhill v. Vint*, (1890) 45 Ch. D. 351 (C. A.). If a lease is entered into for the purpose of using the premises to boil oil and tar contrary to the provisions of a statute, the lessor cannot sue for the rent even though the lessee is not bound to use the premises for such purpose: *Gaslight Co. v. Turner* (1840) 5 Bing. N. C. 666; 6 Id. 324. A lessor is justified in disregarding a contract to let rooms to a person who intends to use them for the delivery of lectures maintaining that the character of Christ is defective and his teaching misleading, for this is an illegal purpose and the contract cannot be enforced: *Cowan v. Milbourn* (1867) L. R. 2 Ex. 230; 36 L. J. Ex. 124.

In *Smith v. White* (1866) L. R. 1 Ex. 626; 35 L. J. Ch. 454, the lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up, in good repair, at the end of the term, and not to use the house as a brothel and the assignment contained covenants to indemnify the lessee against the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease sought to recover the amount from the estate of the assignee on the covenant to indemnify against the covenants in the original lease, and it was held that the lessee's knowledge of the purpose of the assignee prevented recovery on the covenant of indemnity. Here the lessee derived no benefit from the purpose for which the assignee used the house, having parted with the lease on the terms of the assignee relieving him from liability, and he did not participate in or further the assignee's designs. The Court instanced the case of *Jennings v. Throgmorton* (1825) Ry. & Moo. 251, where it signified nothing to the lessor, whether the woman carried on the

business of a courtesan or any other proper business, provided only she paid the rent, and yet the Court held that the rent could not be recovered.

See also p. 75, *ante*.

### *Exceptions and Reservations.*

An exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it: see *Cooper v. Stuart* (1889) 14 A. C. 286, per Lord Watson, but a reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence: 4 Jarm. Prec. (3rd Ed.) 315.

A right of way reserved to the lessor by the lease over the lands demised is not strictly an exception or a reservation, being neither parcel of the thing demised nor issuing out of it, but is in strictness of law an easement newly created by way of grant from the lessee: *Durham and Sunderland Ry. Co. v. Walker* (1842) 2 Q. B. 940; 2 G. & D. 326. A lease may expressly reserve liberty to the lessor to enter and cut timber: *Campbell v. Shields* (1879) 44 U. C. R. 449; *Chestnut v. Day* (1838) 6 O. S. 637. But where a lease was made of lands, except and always reserved out of the demise unto the lessor all timber, trees, etc., and also except and reserved all royalties whatsoever to the premises belonging, or in anywise appertaining, it was held that this was an exception or reservation, and was not pleadable as a grant: *Pannell v. Mills* (1846) 3 C. B. 625. An exception being the act and words of the lessor, shall be taken strictly against him: Shep. Touch. 77. An exception must operate immediately so that the subject of it does not pass to the grantee: *Cooper v. Stuart* (1889) 14 A. C. 286. A clause in a lease purporting to reserve underwoods and underground produce enures not as a reservation but as an exception: *Doe d. Douglas v. Lock* (1835) 2 Ad. & El. 743. Where timber trees are excepted, the soil in which they grow will not be covered by the exception: *Whistler v. Paslow*, (1618) Cro. Jac. 487; *Legh v. Heald* (1830) 1 B. & Ad. 622. Under an exception of "all wood



and underwood" trees great and small are generally excepted, but not fruit trees: *London v. Southwell* (1619) Hob. 304; and an exception of "all trees, woods, coppicewood grounds of what kind or growth soever," does not extend to apple trees: *Id. Wyndham v. Way* (1812) 4 Taunt. 316; nor an exception of "all timber trees and other trees, but not the annual fruit thereof": *Bullen v. Denning* (1826) 5 B. & C. 842. An exception of minerals includes *prima facie* every substance which can be got from underneath the surface of the earth for the purpose of profit: *Hext v. Gill* (1872) L. R. 7 Ch. 699; 41 L. J. Ch. 761; the test being whether they had a use and value of their own independent of and separate from the rest of the soil: *Jersey v. Neath* (1889) 22 Q. B. D. 555; 58 L. J. Q. B. 373. This construction will not prevail where there is something in the context or in the nature of the transaction to confine the word to a more limited meaning: *Hext v. Gill* (1872) L. R. 7 Ch. 699. Thus an exception of minerals in a building lease will not prevent the lessee from digging the necessary foundations and converting the materials dug out, though this holds only with reference to some definite building about to be erected by him: *Robinson v. Milne* (1884) 53 L. J. Ch. 1070; and an exception of minerals will in conformity with the well established rule be controlled by regard to any reasonable custom which is applicable to the demise and not inconsistent with the exception: *Tucker v. Linger* (1882) 8 A. C. 508; 52 L. J. Ch. 941. Where a tenant entered upon a farm under an agreement for a lease of the farm "except thirty-seven acres," without specifying which, it was held that the exception was valid and that the choice of the excepted portion would lie with the lessee or with the lessor according as the lease had or had not been executed: *Jenkins v. Green* (1859) 27 Beav. 437; 28 L. J. Ch. 817. But an exception in an agreement to convey of "necessary land for making a railway" is too vague: *Pearce v. Watts* (1875) L. R. 20 Eq. 492; 44 L. J. Ch. 492. A lease of a store may except a certain portion thereof for the use of the lessor and may provide for the occupation by the lessor of the excepted portion

only during business hours, and that only he or his wife shall carry a key thereof or be employed therein: *McKenzie v. McGlaughlin* (1885) 8 O. R. 111.

In order to reserve game the demise must actually reserve the right of entry in order to take game. A mere agreement by a tenant not to destroy game but to endeavor to preserve it, is not sufficient, for by such agreement the right to kill the game though taken away from the tenant is not given to the landlord: *Coleman v. Bathurst* (1871) L. R. 6 Q. B. 366; 24 L. T. 466; 19 W. R. 848.

A reservation of game will not entitle the landlord or a person to whom he has let the shooting to bring it on to the land to an unreasonable amount or cause it to increase to an unreasonable extent so as to injure the tenant's crops: *Farrer v. Nelson* (1885) 15 Q. B. D. 258; 54 L. J. Q. B. 385. A reservation of "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers and water courses made or to be made within, through, or under the said premises," extends to water and soil coming from contiguous lands and buildings whether they actually in the first instance arose from them or not, but not to water not in its natural condition and such matters as are the product of the ordinary use of land for habitation: *Chadwick v. Marsden* (1867) L. R. 2 Ex. 285; 36 L. J. Ex. 177. A parol demise of land reserving to the landlord all the hedges, trees, thorn bushes, fences with lop and top, operates as a license to enter the land for the purpose of cutting and carrying away the trees: *Hewitt v. Isham* (1851), 7 Exch. 77; *Liford's Case* (1614) 11 Co. R. 51 (b).

### *Endorsements.*

It sometimes happens that after a lease has been engrossed but before it is executed, some additional covenant or stipulation is agreed on, which cannot conveniently be interlined. In such case it may be indorsed on the lease, and referred to in the proper place thus:—"See back (A)."

Memoranda indorsed upon leases, if made previously to the execution of the lease and as part of the same transaction, are considered in construction and effect as part of the instrument and the consideration for the lease applies to the indorsement: *Merrick v. L'Esperance* (1860) 10 U. C. C. P. 259; although they add to or change the provisions of the deed: *Griffin v. Stanhope* (1618) Cro. Jac. 456; *Frogley v. Lovelace* (1859) 1 Johns, 33. An indorsement upon a deed or other alteration therein shall be taken to have been made before the execution of the deed and to be parcel of it, in the absence of proof to the contrary: *Brewster v. Kidgell* (1697) Carth. 438; *Flint v. Brandon* (1803) 1 Bos. P. N. R. 73; *Doe v. Catomore* (1851) 16 Q. B. 745.

By indorsement under seal the payment of rent may be changed or the lease cancelled: *Forge v. Reynolds*, (1868) 18 U. C. C. P. 110. An indorsement may amount to a new lease; and it would seem to be subject to the provisions of the Statute of Frauds and if it purport to lease for three years from a future day must be under seal: *Kaatz v. White* (1869) 19 U. C. C. P. 36.

A lessee of house No. 107 signed an indorsement on the lease that he would lease house No. 109 at the same rent, he getting possession as soon as the premises were vacated by the then tenants. This indorsement was not signed by the lessor and possession of 109 could not be immediately obtained. The indorsement was set up by the lessee for the purpose of showing a liability thereunder on the part of the lessor, and it was held that from the time of getting possession of 109 the lessee held it on the same terms as 107 and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms applied to the letting of No. 109. Under the circumstances the fact that the lessor had not signed the indorsement was immaterial: *Mehr v. McNab* (1893) 24 O. R. 653.

Under the R. S. O. 1914 c. 109, s. 6, no receipt need be indorsed on a lease, the receipt in the body being sufficient.

A building lease was expressed to be granted "in consideration of the moneys which have been expended by the lessee in construction of the dwelling house and erections hereby demised and in consideration of the rent hereinafter reserved and the covenants by the lessee hereinafter contained." The Court held that to constitute a receipt in the body of the deed within the meaning of s. 6, express words acknowledging the receipt of such consideration were necessary and that the lease did not contain such receipt, and that plaintiff who claimed under the lessee was not entitled to the benefit of that section: *Renner v. Tolley* (1893) 68 L. T. 815; W. N. 90.

### IMPLIED COVENANTS.

ARTICLE 15.—Apart from the statutory provisions noted under, and in the absence of express covenants on the subject, there are implied in every lease the following and no other covenants: [1] *by the lessor*—a covenant for quiet enjoyment, and in case of a furnished house a warranty of fitness at the commencement of the term; [2] *by the lessee*—a covenant to treat the premises in a tenant-like manner and in the case of agricultural property this covenant includes maintaining of fences and hedges, and cultivating in a proper manner in accordance with the custom of the country.

[Authorities: 4 Encyc. Laws of Eng., pp. 172, 173].

#### *The Absence of Express Covenants.*

An express covenant always displaces an implied one to the same effect: *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836; *Murphy v. Bandon Co-operative Society* [1909] 2 Ir. R. 510, affirmed; [1911] 2 Ir. R. 631 [C. A.]; *Davis v. Pitchers* (1874) 24 U. C. C. P. 516 (quiet enjoyment), and see p. 536, where this subject is further discussed as to covenant for quiet enjoyment.

*Implied Covenants.*

These covenants—usually called covenants in law—are as regards their duration only co-extensive with the lessor's own interest in the premises, whether the demise is by deed: *Baynes v. Lloyd* [1895] 2 Q. B. 610; *Adams v. Gibney* (1830) 6 Bing. 656; or by parol: *Penfold v. Abbott* (1862) 32 L. J. (Q. B.) 67.

*The Covenant for Quiet Enjoyment.*

“From the mere fact of a letting, there is, at any rate, some undertaking for the enjoyment of the property by the lessee,” per Channell, J., in *Budd-Scott v. Daniel* [1902] 2 K. B. 351; 71 L. J. (K. B.) 706; 18 T. L. R. 675; [Div. Ct.] 22 C. L. T. 297, where it was held that the implied obligation does not arise only when the word “demise” is used, but also when equivalent words such as “let” or “agree to let” are employed, and see *Davis v. Pitchers*, *ante*, and *Kerr v. Bearinger* (1869) 29 U. C. R. 340.

It was early settled that the use of the word “demise” implies such a contract: *Burnett v. Lynch* (1826) 5 B. & C. 589; 4 L. J. (O. S.) (K. B.) 274.

*The Contrary Opinions in the English Court of Appeal.*

The question in *Jones v. Lavington* [1903] 1 K. B. 253; 72 L. J. (K. B.) 98; 19 T. L. R. 77 [C. A.]; 23 C. L. T. 23, was whether by agreeing to “let” premises the lessor impliedly covenanted for quiet enjoyment. Held, applying *Baynes & Co. v. Lloyd & Co.* [1895] 2 Q. B. 610; 64 L. J. (Q. B.) 787, that at all events there was no implied covenant as against a title paramount, which was the case in the judgment, and the Court evidently inclined to the view that there was no implied covenant even as to the lessor's acts. It was also held that an oral warranty as to the permissible mode of user of the premises had not been made out, and in any event that such a question could not be dealt with by collateral warranty, but was part of the subject matter of the contract.

In *Baynes & Co. v. Lloyd & Co.* [1895] 1 Q. B. 820; 64 L. J. (Q.B.) 411, it was held by the Court of first instance, that notwithstanding the absence of the word "demise" the law implied a contract for quiet enjoyment, simply by virtue of the relationship of landlord and tenant, but in the Court of Appeal [1895] 2 Q. B. 611; 64 L. J. (Q. B.) 411, Kay, L.J., considered—though the case was decided on other grounds—that the implication of the contract was negatived in cases where the word was not used.

### *The Weight of Opinion.*

It is to be observed that *Baynes & Co. v. Lloyd & Co.* was decided before, and *Jones v. Lavington* after *Budd-Scott v. Daniel* (*supra*). This latter case was followed by Swinfen-Eady, J., in *Markham v. Paget* [1908] 1 Ch. 697; 77 L. J. (Ch.) 451, who said he was bound to follow what the current of authority for more than the last sixty years had determined to be law, and what three Chief Justices of England had successively held to be the common law, both upon principle and authority, and to be the only view consistent with common sense. In that case a mansion had been let with a reservation of the minerals, and power to work them, but no power to let down the surface. The minerals being worked, the house was injured, and the plaintiff disturbed in his enjoyment of it, and he was held entitled to recover against the landlord, on the ground that the tenancy agreement contained an implied contract of quiet enjoyment. "It need hardly be said that the result would be the same, whether the tenancy was created by an instrument in writing or was by parol only" (1909) 29 C. L. T. 759 [Ed.] and see 4 Encyc. Laws of Eng. 172.

### *Scope of the Covenant.*

The scope of the express covenant for quiet enjoyment is dealt with at p. 537, *post*.

"In the case of the implied covenant, the liability of the landlord is limited to the duration of his own interest.

So in *Baynes & Co. v. Lloyd & Co.* [1895] 2 Q. B. 610, where a landlord, who had a term of 8 years to run in an house, sublet the same to a tenant for 10 years, he was not liable for a breach of the implied covenant occurring after the end of the head term."

"It is, apparently, a doubtful point whether the implied covenant, like the express one, extends only to acts of persons claiming under the lessor. In *Jones v. Lavington* [1903] 1 K. B. 253 [C. A.] it was held that where the word 'let' is used, the covenant does not extend beyond the acts of such persons and possibly the result is the same when there is the word 'demise,' but *query*, as Snell would say," (1909) 29 C. L. T. 759 [Ed.].

See also an article in the Law Journal (20 Dec. 1890), quoted in (1892) 12 C. L. T. 99, as to the personal nature of implied covenants.

### *The Implied Covenant for Title.*

This covenant is not implied in a demise by parol: *Bandy v. Cartwright* (1853) 8 Ex. R. 913; 22 L. J. (Ex.) 285.

If the word "demise" is used it may be implied in a lease by deed but probably not otherwise: 4 Encyc. L. of E. 172. *Baynes & Co. v. Lloyd & Co.* (*supra*), and see also *Clayton v. Leech* (1889) 41 Ch. D. 103 and *Woods v. Opsal* [1918] 1 W. W. R. 985 [Macdonald, J.] as to the rule of *caveat emptor* being applied as against a lessee.

### *The Covenant for Tenant-like User.*

The only implied covenant by the tenant is that the tenant will use the premises in a tenant-like manner and will not commit voluntary waste: the tenant is not liable for permissive waste and an accidental fire without negligence is permissive, not voluntary waste: *Wolff v. McGuire* (1896) 28 O. R. 45; 26 Occ. N. 347 [Div. Ct.]. See this case in the notes to Article 12, p. 121, *ante*.

In *Warren v. Winterburn* (1907) 6 W. L. R. 498; 27 C. L. T. 755 [B. C.], it was held that a tenant had done all he was reasonably bound to do to prevent water pipes

from bursting, having regard to what the people of the city has done, he being a stranger—his user was tenant-like.

In *McCuaig v. Lalonde* (1911) 23 O. L. R. 312; 18 O. W. R. 759; 2 O. W. N. 791 [Div. Ct.] it was held that there was an implied obligation on a tenant who had leased a dwelling house to use it as such and not to use it as an hospital or “pest house” in which to have his family quarantined. The result was to render the house unfit for habitation under the Public Health Act [Ont.].

*Ryan v. Weilgoesz* (1913) 4 W. W. R. 982 [Patterson, Co.J., Man.]. Held, that in winter in Manitoba there is a duty on the part of the tenant to give his landlord notice of the day of vacating the premises or to take precaution that the premises shall not be damaged by frost.

No covenant or promise as to repairs can be implied where there is an express stipulation on the subject, the maxim being *expressum facit cessare tacitum*: *Standen v. Christmas* (1847) 10 Q. B. 135; 16 L. J. (Q. B.) 265; *Crawford v. Bugg* (1886) 12 O. R. 8.

A monthly tenant who knew that damage from frost was likely to happen if precautions were not taken to prevent water he had brought into the house by pipes from freezing and did not take such precautions, was held liable in damages. The tenant shut off the water but did not drain the pipes—let the fires out on a very cold night and the pipes burst: *Conklin v. Dickson* (1917) 40 O. L. R. 460; 13 O. W. N. 86; 38 D. L. R. 692 [App. Div.].

Where premises are demised for a certain purpose there is an implied negative provision that the land should not be used for other and inconsistent purposes.

While the lessor is prevented from interfering with the enjoyment of the property for the purpose contemplated by the lessee, it is equally clear that the diversion thereof by the lessee to any other purpose will be restrained by injunction. *Kehoe v. Lansdowne*, [1893]; A. C. 451; *Lancey v. Johnston* (1881), 29 Gr. 67.

So where a lease was “for pasturing purposes” a tenant was restrained from selling and removing from



the farm any part of a crop of hay raised on the lands. It was held he had a right to grow the hay and to cut and feed it to his cattle or to leave it on the demised premises after the termination of his lease: *Westropp v. Elligott* (1884), 9 A. C. 815, discussed, and followed: *Bradley v. McClure* (1908) 18 O. L. R. 503; 12 O. W. R. 215, 695; 28 C. L. T. 779 [Anglin, J.—Div. Ct.].

Water lots were demised to a yacht club to be used only for mooring purposes and providing means of access: Middleton, J., held that this implied a covenant to use them in the manner set forth and in no other way: *Toronto Harbour Commissioners v. Royal Canadian Yacht Club* (1913) 29 O. L. R. 391. See also pp. 616, 553 and 617, *post*.

The courts will restrain breaches of such covenants by injunction.

As to covenants restricting the user of premises see p. 553, *post*.

An injunction was granted to restrain a lessee from boring for oil when he had no right to do so under the lease: *Lancey v. Johnston* (1881) 29 Gr. 67.

### *Implied Covenants in the Cases of Agricultural Property.*

There will be implied in leases of agricultural lands a covenant to cultivate in an husbandlike manner in accordance with the custom of the country: *Wedd v. Porter* [1916] 2 K. B. 91; *Williams v. Lewis* [1915] 3 K. B. 493; 85 L. J. K. B. 40; 113 L. T. 1161; 32 L. T. R. 42 [Bray, J.]; *Legh v. Hewett* (1803) 4 East 154; 2 E. & E. Dig. 12.

This subject is dealt with in 2 Eng. & Emp. Dig. pp. 10 to 27, and see the cases discussed at p. 608, *post*,—“*Agricultural Leases*”—and *Dunsford v. Webster*, referred to at pp. 161 and 266.

### *The “Covenant” to Pay Rent.*

The payment of rent is a matter of express contract between the parties and as has been seen [p. 1, *ante*] no rent need be reserved; there is, therefore, no implied covenant to pay rent.

*Covenants Implied from Construction.*

"It seems to me that whenever circumstances exist in the ordinary course of business life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted:" per Esher, M.R., in *Ex p. Ford* (1885) 16 Q. B. D. 305.

The same Judge in *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q. B. 488, held that there is the right to imply a stipulation in a written contract where "*on considering the terms of the contract* in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

Bowen, L.J., laid down the same principles in *Lamb v. Evans* [1893] 1 Ch. 218.

In *Brymer v. Thompson* (1915) 34 O. L. R. 194; 8 O. W. N. 527; 23 D. L. R. 840, Middleton, J., after referring to the above authorities, said, at p. 196, "I think that there is nothing in the fact that the case is one between landlord and tenant to render the law upon which I am acting inapplicable: *De Lasalle v. Guildford* [1901] 2 K. B. 215; 70 L. J. (K. B.) 533 [C. A.], determines that a tenant can sue upon a collateral verbal warranty [as to which see Art. 91], and puts an end to the suggestion in earlier cases that there can be no suit upon a warranty unless it is in the lease. *A fortiori*, there can be an action upon a collateral contract such as this. Nor does the Statute of Frauds afford any answer . . . for it is laid down in Halsbury's Laws of England, Vol. 7, p. 383, that there are two distinct agreements, one of which is and the other is not within the statute, the promise which is not required to be in writing to be within the Statute may be enforced, even though it is not evidenced by a writing . . . " and he implied a promise and contract on the part of the landlord adequately and sufficiently to heat premises leased by him as "steam heated," although the written lease made no

mention of steam heating: inadequate steam heating was in fact provided. The judgment was affirmed (1915) 34 O. L. R. 543 [App. Div.] 9 O. W. N. 114; 25 D. L. R. 831.

This case seems to have proceeded upon the principle that an arrangement was entered into which could only take effect by the continuance of an existing state of circumstances [see 10 Hals., s. 833], and see the remarks of Meredith, C.J.O., at p. 545.

In *Macleod v. Harbottle* (1913), 24 W. L. R. 54; 4 W. R. 136 [C. A.]; 11 D. L. R. 126 [B. C.], none of these authorities were considered, but it was held that there was an implied condition—in the lease of an apartment in a house in which an elevator service was provided as a means of access—that an efficient elevator service should be maintained—and damages were given against a landlord who neglected to maintain it. The trial judge found an express agreement to maintain the service but the Court could find no evidence of this. The Court put the rights of a lessee of an apartment on a different footing to those of lessees of ordinary houses or buildings and referred to *Wilson v. Finch-Hatton* and *Sarson v. Roberts*, which are dealt with at p. 571, *post*, as to warranty of furnished houses.

See also *O'Hanlon v. Grubb* (1912) 38 App. D. C. 251; 37 L. R. A. (N. S.) 1213 [U. S.].

In *Davey v. Christoff* (1915) 35 O. L. R. 162, Masten, J., apparently preferred to base his judgment upon *Wilson v. Finch-Hatton* and *Smith v. Marrable* [see p. 571, *post*], but held that if those cases did not apply *Hamlyn v. Wood* and the other cases noted (*supra*) did. The instant case was one of a lease of a *theatre with furniture and equipment* and the heating apparatus was insufficient. It was held that the landlord was bound to supply a proper heating equipment.

The Appellate Division (1916) 36 O. L. R. 123, held that the doctrine in *Hamlyn v. Wood* (*supra*) did not apply, but that *Smith v. Marrable* and *Wilson v. Finch-Hatton* did.

It should be observed that in *Brymer v. Thompson* (*supra*) the premises apparently were *not* furnished

and also that the lessee was to pay for part of the coal for heating.

See *St. George Mansions Co., Ltd. v. Hetherington* (1918) 42 O. L. R. 10; 13 O. W. N. 367; 41 D. L. R. 614, noted at p. 572, *post*.

As to Warranty of Premises see Article 91.

In leases of flats in a building each lessee covenanted with the lessor "to use the demised premises for residential purposes only," and not to "permit to be done on the premises anything which may annoy or lead to the annoyance of the other tenants of the premises, or prejudice the character thereof as residential chambers." It was *held* that a covenant by the landlord that the flats should be used for residential purposes only should be implied, and that he therefore could not lease part of the building for offices: *Gedge v. Bartlett* (1901) 17 T. L. R. 43; [C. A.] 21 C. L. T. 58.

In a lease of sporting rights it was held that there was no implied covenant not to disturb the game: *Dick v. Morton* (1916) 85 L. J. Ch. 623; 60 S. J. 321; 114 L. T. 548; 32 T. L. R. 306; [Eve. J.].

Upon the construction of the provisions of a lease to the plaintiff of part of a building, it was held, that the plaintiff was not entitled to restrain the defendants, who were also tenants of parts of the building, from using the bathroom and water-closet in the building, to which the plaintiff was allowed access, but not sole access, as determined: *Allen v. Johnston* (1913) 25 W. L. R. 325. —[Alta.].

A tenant of a shop in a building who entered into his lease while the building was in the course of erection, was held entitled to the use of a water-closet in the building and to store coal in the rear of the building, although nothing was said about either right in the lease: *Ross v. Henderson* (1901) 21 Occ. N. 219; 8 B. C. R. 5.

Where the lease of an apartment house gave the lessee the use of "the entrance hall, staircases, passages and lifts leading to the suite of rooms hereby demised," it was held that the lessee had the right to the use of the

lift for his servants as well as himself: *Procter v. Moir* (1889) 5 T. L. R. 682.

*Howell v. Hugh Armour & Co.* (1913) 23 W. L. R. 68; 3 W. W. R. 832; 9 D. L. R. 125 [Sask.—Brown, J]. The defendants leased part of a building to the plaintiff, a photographer, knowing he required the premises to be used partly for his business and partly for residential purposes. The lease contained this proviso: "water to be free." Owing to the amount of water used by other tenants on the floor below the plaintiff's supply was practically cut off. Brown, J., said, at p. 71 (of 23 W. L. R.): "There is no guarantee that under all circumstances water shall be supplied to the plaintiff; but there is, as I interpret the provision, under the circumstances, an undertaking on the part of the defendants that neither they themselves nor any one claiming under them shall in any way lessen the supply of water which the plaintiff ordinarily received and needed for the purpose of his business. Or—to put it another way—there is, so far as the supply of water is concerned, a covenant for quiet enjoyment. That being so, the defendants, under such covenant, would be liable, whether they or their lessees, . . . were responsible for the shortage, and equally so whether (their lessees) were lessees before or after the execution of the lease under which plaintiff claims. See *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602; *Markham v. Paget* [1908] 1 Ch. 697; *Blatchford v. Plymouth Corporation* (1837) 3 Bing. N. C. 691 (distinguished as being decided on different pleadings) 18 Hals. p. 529."

The foregoing were all cases where the covenant was implied against the lessor—the same principles apply as against the lessee. In 1903 Richards, J., in *Dunsford v. Webster* (1903) 14 M. R. 529; 23 C. L. T. 290, followed *McIntyre v. Belcher* (1863) 14 C. B. N. S. 654; *The Moorcock* (1889) 14 P. D. 68 and *Hamlyn v. Wood* (*supra*), and implied covenants on the part of the tenant to cultivate and crop in a "crop-rent" lease: see p. 267, *post*.

As to what is sometimes called the implied covenant to repair: *Müller v. Hancock* [1893] 2 Q. B. 177.

Article 93, p. 575, *post*, and *McIntosh v. Wilson* (1913) 23 M. R. 653 [C.A.].

### *Statutory Implied Covenants.*

Every lease of land in Alberta or Saskatchewan for a life or lives or for a term of more than three years must be in the prescribed form and contain the following implied covenant by the lessee:—(1) That he will pay the rent thereby reserved at the times therein mentioned and all rates and taxes which may be payable in respect of the demised lands during the continuance of the lease; (2) that he will at all times during the continuance of the lease keep and at the termination thereof yield up the demised lands in good and tenantable repair, accidents and damage to buildings from fire, storm and tempest or other casualty and reasonable wear and tear excepted: [Alberta Land Titles Act (1906) c. 24, s. 55 (*a*) and (*b*); Saskatchewan Land Titles Act (1917) 2 Sess. c. 18, ss. 93 (*a*) and 93 (*b*).

Where a lease for two years was made in the form prescribed by the Alberta Land Titles Act for leases for more than three years it was held the parties had contracted themselves into the Act and the implied covenant to repair was implied in their lease: *Telfer Bros. v. Fisher* (1910) 15 W. L. R. 400; 3 Alta. L. R. 423.

### *The Manitoba Provisions.*

The Manitoba Real Property Act, R. S. M. c. 171, s. 101 [see p. 95, *ante*] uses the word “may” so that it is optional to use the form of lease prescribed by the Act. If the form is used similar covenants are implied: see s. 102 (*a*) and (*b*). It should also be observed that s. 101 applies to “any term” and is not limited to leases for a life or lives or more than three years.

### *Implied Powers.*

Each such lease in Alberta and Saskatchewan contains implied powers in the lessor (1) to enter and view,

and, (2) for re-entry in default of payment and in *Saskatchewan* only, (3) re-entry in case of a conviction under the Criminal Code of running the place as a disorderly house. [Alberta Land Titles Act (*supra*), s. 56 (a) and (b): Saskatchewan Act (*supra*), ss. 94 (a), (b) and (c).]

The Saskatchewan Landlord and Tenant Act also contains provisions similar to ss. 19 (1) and (2) of the Ontario Act, given below: see 9 Geo. V. c. 79, ss. 9 (1) and 9 (2) [Sask.].

The Manitoba Act (*supra*), ss. 103 (a), (b) correspond with Alberta Act, s. 56 (a) and (b).

The Manitoba Act also provides by s. 165:—

“Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument or endorsed therein; and, in any action for a supposed breach of any such covenant, the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom such action is brought did so covenant, precisely in the same manner, as if such covenant had been expressed in words in such memorandum of transfer or other instrument, any law or practice to the contrary notwithstanding; and every such implied covenant shall have the same force and effect and be enforced in the same manner as if it had been set out at length in such instrument; and, where any memorandum of transfer or other instrument in accordance with the provisions of this Act is executed by more parties than one, such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly.”

The Alberta [s. 131] and Saskatchewan [s. 65] provisions are similar.

#### *The Ontario Provisions.*

“In every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, there shall be deemed to be included an agreement that if the rent

reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, it shall be lawful for the landlord at any time thereafter, into and upon the demised premises or any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as of his former estate": R. S. O. 1914 c. 155, s. 19 (1).

There is a similar provision in New Brunswick: C. S. N. B. 1903, c. 153, s. 3, and see s. 4.

"In every such demise as aforesaid there shall be deemed to be included an agreement that if the tenant or any other person shall be convicted of keeping a disorderly house within the meaning of the Criminal Code, on the demised premises or any part thereof, it shall be lawful for the landlord at any time thereafter, into the demised premises, or any part thereof, to re-enter and the same to have again, repossess and enjoy as of his former estate": R. S. O. 1914, c. 155, s. 19 (2).

Mortgages of Leasehold Property: see p. 1035, *post*.

The Conveyancing and Law of Property Act, R. S. O. 1914, c. 109, provides:—

"22.—(1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the cases in this section mentioned, be deemed to be included, and there shall in those cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share thereof expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common.

(a) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person who conveys, and is expressed to convey, as beneficial owner, namely covenants for



- (I.) Right to convey;
- (II.) Quiet enjoyment;
- (III.) Freedom from incumbrances; and
- (IV.) Further assurance;

According to the forms of covenants for such purposes set forth in Schedule B to the Short Forms of Conveyances Act, and therein numbered 2, 3, 4 and 5, subject to the provisions of that Act.

- (b) In a conveyance of leasehold land for valuable consideration, other than a mortgage, the following further covenant, by the person who conveys, and is expressed to convey, as beneficial owner;

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance.

- (c) In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely:

That the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to, any deed, act, matter or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof is, or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying such subject-matter or any part thereof, in the manner in which it is expressed to be conveyed.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether or not he conveys and is expressed to convey as beneficial owner, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and the covenants on his part mentioned in clause (a) of subsection (1) shall be implied accordingly.

(3) The benefit of a covenant, implied as aforesaid, shall be annexed and incident to and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

(4) A covenant so implied may be varied or extended, and as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied."

See also the Land Titles Act, R. S. O. 1914, c. 126, ss. 32 and 49.

### *Statutory Duties Imposed on Tenant.*

By the R. S. M. 1913, c. 109, s. 3:

"Every tenant on whom a statement of claim in an action to recover the land demised to him has been

served, or to whose knowledge it comes, shall forthwith give notice thereof to his landlord, or to his landlord's bailiff or receiver; and, if he omits so to do, he shall forfeit to the person of whom he holds the value of three years improved or rack rent of the premises demised or holden in the possession of such tenant, to be recovered by action in any Court having jurisdiction for the amount."

*Similar Legislation.*

New Brunswick: 9 Edw. VII. c. 32, s. 35.

Ontario: R. S. O. 1914, c. 155, s. 29.

THE "USUAL" COVENANTS.

ARTICLE 16.—Where an agreement for a lease provides that it is to contain the "usual" or "proper" covenants—and *there are no special circumstances justifying the introduction of other covenants*—the following are the only covenants upon which either party can insist, viz.: *By the lessor*, the usual qualified covenant for quiet enjoyment, and *by the lessee* [1] to pay rent; [2] to pay taxes, except such as are expressly payable by the landlord; [3] to keep and deliver up the premises in repair, and [4] to allow the lessor to enter and view the state of repair; also [5] a clause for re-entry in default of payment of rent.

[Authorities: Davidson's Prec. 3rd Ed. "Leases" Vol. 5, Pt. 1, p. 53; quoted by Jessel, M.R., in *Hampshire v. Wickens* (1878) 7 Ch. D. 555; 47 L. J. (Ch.) 243; the whole referred to in Stroud [2nd Edn.], 2155; *Canadian Pacific Ry. Co. and Toronto* (1900) 27 A. R. 54 [C. A.]; (1902) 4 O. L. R. 134; 1 O. W. R. 255; 22 C. L. T. 235 [Div. Ct.]; (1903) 5 O. L. R. 717; 2 O. W. R. 385 [C. A.]; [1905] A. C. 33; 4 Encyc. Laws of Eng. 174].

Although Jessel, M.R., said in *Hampshire v. Wickens* (*supra*), that "usual covenants might vary (in

their meaning) in different generations: [47 L. J. (Ch.) 245; 7 Ch. D. 555]; the law declares what are usual covenants according to the then knowledge of mankind" there has not been any change for some years in what are "usual covenants."

The question is, however, one of fact "to be determined by evidence and . . . the practice of conveyancers, either orally, or by reference to the standard books on conveyancing": See per Maclaren, J.A., in *In re Canadian Pacific R. W. Co.* (1900) 27 A. R. at p. 62. The same learned Judge also said at p. 62: "I am, therefore, of opinion that there is a large body of admissible evidence to be found in the books of conveyancers, which have been in use for many years. But on the other hand, lessees may, if they think fit, meet that evidence by other evidence."

In the same case when it came before the Court of Appeal on another point (1903) 5 O. L. R. 717, Moss, C.J.O., said at p. 719: "In Woodfall's Landlord and Tenant, 17th Ed., p. 135, it is said that the question what are usual covenants, appears to be one of fact in a case where the parties stipulate for usual covenants, but to be a question of law, where the contract for the lease is silent as to covenants. But it would appear that whether the contract is silent or not as to covenants there are certain covenants which, *prima facie*, go into the lease as usual covenants. Even these, however, may be subject to variation, having regard to special circumstances," and the late learned Chief Justice quotes with approval the remarks of Jessel, M.R., in *Hampshire v. Wickens*, who adopted the statement from Davidson's Precedents, 3rd Ed., Vol. 5, Part 1, p. 3, used in Article 16.

Even where the agreement is confirmed by statute the rules of construction are not thereby affected. See per Moss, C.J.O., at p. 723.

Under a contract to grant a lease "with common and usual covenants," the lessor is not entitled to insert a covenant not to assign or under-let without license: *Re Lander and Bagley's Contract* [1892] 3 Ch. 41; 61 L. J. Ch. 707.

*The Usual Qualified Covenant by the Lessor for Quiet Enjoyment.*

*Hampshire v. Wickens*, ante p. 167.

The covenant for quiet enjoyment is dealt with at p. 536.

[1] *The Covenant to Pay Rent.*

*Hampshire v. Wickens* (*supra*).

[2] *The Covenant to Pay Taxes Except such as are Expressly Payable by the Landlord.*

The question as to whether this covenant was a usual one appears to have first come before a Canadian Court (Ontario) in the *C. P. R. and City of Toronto Case* (*ante*).

The City and Railway Company entered into an agreement for a lease containing no reference to covenants by which the municipality agreed to demise certain lands to the railway company. The lease as settled by the Referee contained a covenant to pay taxes inserted as a usual covenant. The railway company appealing from the Referee's report contended (1) that the agreement was self contained; (2) that by the Ontario Assessment Act, R. S. O. 1897 c. 224, s. 26 (now R. S. O. 1914 c. 195, s. 97: See p. 306, *post*), taxes are payable by the landlord in the absence of agreement to the contrary and—the agreement being silent—the covenant to pay taxes was improper. The Court of Appeal affirming, Boyd, C., rejected these contentions, and held that the covenant was a usual one and properly inserted.

Moss, C.J.O., said (1903) 5 O. L. R. 717, at p. 721: "Whether the question is to be determined as one of law or as depending upon evidence, there is no difficulty in reaching the conclusion that a covenant to pay taxes is a usual covenant in a lease of land forming part of the municipal [722] property. Therefore, in settling the lease in question, the city is entitled to have a covenant to that effect inserted, unless it is made to appear, that by reason of the circumstances or of the terms of the

agreement the C. P. R. Co. is relieved from the ordinary obligation of a tenant or lessee of city property to pay the taxes imposed upon it. From the nature of this case, it is obvious that cases where taxes are chargeable against, and recoverable from, the owner, furnish no analogy. The question of whether the covenant to pay taxes is a usual one for insertion in a lease of the kind in question here, must be determined by other considerations."

Taxes are dealt with at pp. 269 and 306, *et seq.*, *post*.

[3] *The Covenant to Keep and Deliver up the Premises in Repair.*

*Hampshire v. Wickens* (*ante*) p. 167.

The covenant to repair was omitted in the C. P. R. and Toronto case (*supra*), as the jurisdiction to keep the railway in effective operation was [then] in the Railway Committee of the Privy Council and it was not shewn that that did not sufficiently protect the city.

[4] *The Covenant to Allow the Lessor to Enter and View the State of Repair.*

*Hampshire v. Wickens* (*ante*) p. 167.

[5] *A Clause for Re-entry in Default of Payment of Rent.*

Moss, C.J.O., said in *Re Canadian Pacific R. W. Co. and Toronto [City]* (1903) 5 O. L. R. 717 (C.A.), noted at length at p. 168, *ante*, at p. 722: "The proviso for re-entry on non-payment of rent is so common and usual in leases that it ought not to be excluded in this instance upon the mere suggestion that difficulty may arise in enforcing it. At present I am not convinced that s. 143 of the Railway Act applies to the circumstances of this case. . . ."

This proviso is limited to the covenant for payment of rent unless there is an expressed stipulation to the con-

trary. *In Re Lander and Bagley's Contract* [1892] 3 Ch. 41; 61 L. J. (Ch.) 707.

### *Other Covenants.*

In a lease of a public house, a covenant that the lessee must reside on the premises and personally conduct the business and that he will not assign without consent, is not usual. A proviso for re-entry in such an agreement will not be allowed to apply to any covenant except that for the payment of rent in the absence of any stipulation to the contrary: *Re Lander and Bagley's Contract* (*ante*).

Under an agreement for a lease to contain "all usual and customary mining clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee or otherwise than on non-payment of rent: *Hodgkinson v. Crowe* (1875) L. R. 10 Ch. 622; 44 L. J. (Ch.) 680; L. R. 19 Eq. 591. The law on this point has not been altered by the provisions of the Landlord and Tenant Act, noted at p. 163: *Re Anderton and Milner's Contract* (1890) 45 Ch. D. 476; 59 L. J. (Ch.) 765.

In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended lessee from accepting the title. But a power of re-entry in a lease if the lessee and his assigns should become bankrupt or make a composition with creditors or if execution should issue against either of them, is unusual, and an intended underlessee may object on this ground: *Hyde v. Warden* (1877) 3 Ex. D. 72 [C. A.]; 47 L. J. Q. B. 121.

### USUAL COVENANTS IN AGREEMENT FOR LEASE.

ARTICLE 17.—Where an agreement for a lease is silent as to the covenants to be inserted, they must be "the usual covenants."

[Authorities: *Hampshire v. Wickens* (1878) 7 Ch. D. 555; 47 L. J. (Ch.) 243; *Canadian Pacific Railway Co. v.*

*Toronto* (1900) 27 A. R. 54 (C. A.); (1902) 4 O. L. R. 134 (D.C.); (1903) 5 O. L. R. 717 (C. A.); [1905] A. C. 33; 4 Encyc. Laws of Eng. 174].

The case of *C. P. R. v. Toronto* (*supra*), was one of an agreement containing a great many provisions settling many disputes between the named parties and a second railway company and providing for a lease—renewable in perpetuity at an agreed rent—payable on named days, but nothing was said about covenants. It was held (see p. 117, *ante*), that the agreement was not self contained, and should contain the usual covenants and that covenants to pay taxes and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances, usual covenants.

### CONCURRENT AND FUTURE LEASES.

ARTICLE 18.—While a lease is still outstanding another lease may be made of the same lands for a term equal to, or greater or less than the existing term: this is a concurrent lease.

[Authorities: 18 Hals. s. 861.]

### ENTRY UNDER LEASES.

ARTICLE 19.—A lessee must enter upon the demised premises under his lease to perfect his title and enjoy the full legal benefit of it—until he enters he has merely an *interesse termini*.

[Authorities: 18 Hals. s. 860; *Wallis v. Hands*, [1893] 2 Ch. 75; 62 L. J. (Ch.) 586.]

#### *The Lessee's Interest before Entry.*

As has already appeared (p. 5, *ante*), the phrase *interesse termini* relates to the interest which the termor has before he has taken possession by force of the lease which has been made to him. It is never applied to a freehold lease where an immediate estate passes: *Eccle-*



*siastical Commissioners v. Treemer*, [1893] 1 Ch. 166; 62 L. J. Ch. 119; but only to a lease under which the lessee has a mere right of entry.

This right he may assign, or if he dies it will pass to his personal representatives: Co. Lit. 46 b.; *Gillard v. Cheshire Lines Committee* (1884) 32 W. R. 943 [C. A.] But if one of two lessees be already in possession the estate will vest without entry: *Keyse v. Powell* (1853), 2 E. & B. 132; 22 L. J. (Q.B.) 305.

A lease in reversion, *i.e.*, a lease to commence upon the determination of a subsisting lease confers an *interesse termini* on the lessee while the subsisting lease remains undetermined, the reversion until the determination of that lease continuing in the lessor: *Hyde v. Warden* (1877) 3 Ex. D. 72; 47 L. J. (Q. B.) 121 [C. A.]; *Doe d. Rawlings v. Walker* (1826), 5 B. & C. 111; 4 L. J. (O.S.) K. B.) 93; *Smith v. Day* (1837) 2 M. & W. 684, 694; 6 L. J. (Ex.) 219; *Blatchford v. Cole* (1858), 5 C. B. N. S. 514; 28 L. J. (C.P.) 140.

There is no distinction between leases *in præsentī* (except under the Statute of Uses) and leases *in futuro*, in each case there is a right only, an *interesse termini*, and not an estate.

The liability to pay rent before entry is dealt with in Article 36.

### *The Lessee's Right to Possession.*

An agreement which operates as an actual letting amounts to an agreement to give possession: *Coe v. Clay* (1829) 5 Bing. 440, 7 L. J. (O.S.) (C.P.) 162; *Jinks v. Edwards* (1856) 11 Exch. 775.

By agreement in writing the defendants agreed to let to the plaintiff certain premises for the term of one year from the 29th of September, 1854, and so on from year to year, as long as the parties thereto should agree; it was held that there was an implied contract on the part of the defendants to give the plaintiff possession of the premises on the 30th of September: *Jinks v. Edwards* (*supra*).

In the absence of any express covenant the word " demise " has been held to raise an implied covenant that the lessee shall be permitted to enter and enjoy where he has never been allowed to do so: *Smart v. Stuart* (1837) 5 U. C. Q. B. (O.S.) 301; *Saunders v. Roe* (1867) 17 U. C. C. P. 344.

An actual letting of lands or tenements where the lessee does not obtain possession cannot, if verbal only, be the basis of an action by the lessee against the lessor to compel the latter to give possession, because it is in respect of an interest in lands which must be in writing under the 4th section of the Statute of Frauds: *Moore v. Kay* (1883) 5 A. R. 261; *Marrin v. Graver* (1885) 8 O. R. 39; *Bank of Upper Canada v. Tarrant* (1860) 19 U. C. R. 423.

In an action by a lessee against the lessor on a covenant in a lease under seal to deliver possession on a certain day, the defendant pleaded an agreement contemporaneously with the lease, and stated to be in consideration that defendant " had leased " the premises whereby the plaintiff agreed not to bring any action for not getting possession, but the plea was held bad for attempting to alter by writing an instrument under seal and also as setting up a past consideration: *Wilson v. Keys* (1865) 15 U. C. C. P. 32.

A lease made on the 3rd April, 1862, for the term of 12 years from 1st April, 1863, contained the following covenant: " and the said lessor covenants with the said lessee for quiet enjoyment, and it is hereby agreed between the parties hereto that the said lessee shall be at liberty to take possession of the said premises and every part thereof on the 20th day of October next " (1862). Before the latter day the lessor died and on the day the lessee went to the premises and found the lessor's widow there, who claimed her right to dower and refused possession. He then demanded possession of the lessor's executors and brought an action for breach of the covenant, and it was held to be independent of the lease which commenced in April, 1863, and although the plaintiff

might have maintained ejectment, he was entitled to a verdict in his action: *Thompson v. Crawford* (1864) 13 U. C. C. P. 53.

Covenant on an indenture whereby A. "leased and to farm let" to B. certain premises at a yearly rent, the crops in the ground and the stock and implements of husbandry to be valued on the day of entry, and to be taken by B. at such valuation. B. demanded possession at a tavern not on the premises, but A. refused to give it unless he was paid or received security for the value of the crop and stock; it was held that A. was justified in such refusal under the terms of the lease, he at the end of the term being bound to give credit for the crops: *Harvey v. Ferguson* (1852), 9 U. C. R. 431.

In *Wood v. Saunders* (1912) 3 D. L. R. 342, 21 W. L. R. 195 [Wetmore, C.J., Sask.], it was held that a lessor was not entitled to refuse possession to the lessee, because the lessee had refused to complete a transaction between them entirely outside the lease—and damages were given. See this case noted under Article 118, Termination of Tenancy.

A party who has only an *interesse termini* may maintain an action against a third person, who before the term commences and before entry excavates on adjoining property and thereby damages the demised premises: *Gillard v. Cheshire Lines Committee* (1884) 32 W. R. 943 [C.A.]

But such a lessee before entry cannot bring an action on the covenant for quiet enjoyment for the essence of a breach of such a covenant is the disturbance of possession: see *Sanderson v. Berwick-on-Tweed Corporation* (1884) 13 Q. B. D. 547.

Neither can he maintain an action for trespass or damages but may bring an action against the lessor for not putting him in possession: *Wallis v. Hands (ante)*; *Coe v. Clay (ante)*; *Jinks v. Edwards (ante)*; *Harrison v. Blackburn* (1864), 17 C. B. N. S. 678; or an ejectment against a person coming in under his lessor: *Cleveland v. Boice* (1862) 21 U. C. R. 609. The lessee of a lot of land found defendant in possession as an intruder, and gave him

notice of the lease and requested him to leave the lot. Defendant afterwards cut off some valuable timber for which the lessee brought trespass, and it was held that he could recover without further proof of entry. *St. Leger v. Manahan* (1837) 5 U. C. Q. B. (O.S.) 89.

“Where by leasing premises to a third person, a lessor puts it out of his power to give possession of demised premises, he is liable to pay damages to the person aggrieved to the extent of the value of his bargain. In such a case the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damage.” Anglin, J., in *Jarvas v. Tormey* (1909) 13 O. W. R. 432, applying *Ford v. Tiley* (1827) 6 B. & C. 325, considering *Day v. Singleton* [1899] 2 Ch. 320; *Jacques v. Millar* (1877) 6 Ch. D. 153, refusing specific performance on the ground of delay, but giving damages.

In Ontario, there is no recovery for prospective loss of profits from a business to be carried on upon the premises: *Marrin v. Graver* (1885) 8 O. R. 39, disapproving *Ward v. Smith* (1822), 11 Price 19; followed in *Jarvas v. Tormey* (*supra*), where Anglin, J. (p. 437), said that the landlord is not to be treated as trustee of the premises, and so accountable for whatever increase in rental he may obtain on the re-leasing of the premises. The basis of damages is compensation to the tenant, not punishment of the landlord. See also *Rotman v. Pennett* (1920) 47 O. L. R. 433; 54 D. L. R. 692 [App. Div.] and the cases noted at pp. 1002, *et seq.*, *post*: [damages for failure to sell the fee].

It is not open to the tenant to show that he rented the premises for the purpose of there carrying on a certain business of which the landlord was aware and that he could not procure other premises and to claim the profits which he might have made in such business if he had been let into possession: *Marrin v. Graver* (*supra*).

A. had agreed verbally to let to B. a certain shop and premises for a year, to commence at a future day, and on the day A. put B. in possession of part of the premises,

but could not give him possession of the residue, in consequence of which B. suffered a loss; it was held that the lease was valid under the Statute of Frauds, and B. was entitled to damages for not being put in possession of the whole of the demised premises: *Clarke v. Serricks* (1851) 2 U. C. R. 535.

Where a sub-lessor being himself a tenant for years, grants to his sub-lessee the residue of his interest to commence from the termination of the existing sub-lease, this would not be an assignment of the original lease, but would give to the sub-lessee an *interesse termini* not creating a merger, for the reversion remains in the sub-lessor until the right of entry becomes an estate: *Hyde v. War-den* (1877) 3 Ex. D. 72; 47 L. J. (Q. B.) 121 [C. A.].

The rule in *Flureau v. Thornhill* [see p. 1002, *post*], that where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages for the loss of the bargain, does not apply in the case of a lease granted by one who has no title to grant it. In such case the lessee, in suing on the covenant for quiet enjoyment, is entitled to be placed in the same position as he would have been if the contract had been fulfilled: *Lock v. Furze* (1865) L. R. 1 C. P. 441; 35 L. J. C. P. 141.

Until entry an action for use and occupation will not lie against a lessee: see p. 336. In the case of a lease under seal rent may be sued for before entry: see p. 279.

The fact that the lessee has obtained the lease by means of a fraudulent misrepresentation does not after entry avoid the lease: *Feret v. Hill* (1854) 15 C. B. 207; 23 L. J. (C.P.) 186.

The lessor cannot interfere with the lessee's right of access to the demised premises on the ground that the lessee contemplates the commission of an unlawful act, even if such act be expressly prohibited by the terms of the lease: *Lilley v. Bennett* (1888) 5 T. L. R. 156.

But if possession has not been taken the existence of fraud or concealment on the part of either party will

entitle the other to avoid the lease: *Mostyn v. West Mostyn Coal Co.* (1876) 1 C. P. D. 145; 45 L. J. (Q. B.) 401.

See also *Hare v. Krick*, noted at p. 1026 (*post*), and *Connor v. Ferguson* [1920] 3 W. W. R. 401 [Man.-Curran, J.]

### *The Lessor's Remedies.*

“When a lessee executes a lease and subsequently, even before the time when his right of possession accrues, improperly and without justification declines to take possession, or carry out the lease, he does an actionable wrong to the lessor. The lessor may:—

[1] Rely on his action against the lessee—stand by and leaving his premises vacant, sue the lessee for rent as the same becomes due under the lease, or

[2] Without releasing or preventing his action against the lessee, for the sake of reducing the damages, occupy the premises or relet them.” *Per* Ryan, Co.J., in *Arden Hotel Co. v. Mills* (1910) 20 M. R. 14; 14 W. L. R. 410 [Co. Ct.—C.A.]. And see the remarks of Howell, C.J.M., at p. 413, quoting Lord Esher in *Johnstone v. Milling* (1886) 16 Q. B. D. 467. This question was also considered in the cases noted at p. 681.

If the landlord retains or relets and notifies the tenant that he will not release him, and that he looks to him for damages, his occupation or reletting is for the benefit of the lessee, and although it will probably reduce the amount of damages it cannot, contrary to the intent of the lessor, be held a release of the lessor's right of action for damages for breach: *Festing v. Hunt* (1890) 6 M. R. 381, referred to: *Arden Hotel Co. v. Mills* (*supra*).

In *Fitzgerald v. Mandas* (1910) 21 O. L. R. 312; 16 O. W. R. 425; 1 O. W. N. 878, [Riddell, J.] said at p. 315: “It is the case of two contracting parties of whom one expressly repudiates to the other the contract between them, and notifies him that he will not be bound by it, and that in unequivocal terms. In such a case the law is well settled that the other party may thereupon treat the contract as at an end except for the purpose of claiming damages for the breach of the same:

*Planché v. Colburn* (1831) 8 Bing. 14; *Hochster v. De La Tour* (1853) 2 E. & B. 678; *Withers v. Reynolds* (1831) 2 B. & Ald. 882; *Mersey Steel Co. v. Naylor* (1884) 9 A. C. 434; *Rhymney v. Brecon* (1900) W. N. 169. And since the withdrawal by Lord Bramwell at p. 446 of the report in 9 A. C. of what was attributed to him in *Honck v. Muller* (1881) 7 Q. B. D. 92 (*Hoare v. Rennie* (1859) 5 H. & N. 19), the rule has not been changed or affected by the fact that the contract has been in part performed. Of course, the repudiation of the contract must be plain and unequivocal: such cases as *Johnstone v. Milling* (1886) 16 Q. B. D. 460, and those cited in 9 A. C. and 1900 W. N., show the strictness of the rule. The action then becomes a plain common law action for damages, the plaintiffs having elected to consider the contract at an end (except for the purpose of damages) instead of, as they might have done, insisted upon its continuance. The measure of damages is the amount by which the plaintiffs are less well off than if the contract had been performed. The plaintiffs having done all in their power to minimize damages, there can be no question as to part of the claim."

Lessees deposited with their lessor a sum of money as a guarantee that they would take possession of the demised premises upon completion of certain alterations provided for in the lease. Before the alterations were completed the lessees were guilty of a breach of covenant not to assign or sublet without leave and the lease was declared forfeited. It was held that the lessees were entitled to recover the amount of deposit: *Von Serbinoff v. McCarthy* (1913) 5 W. W. R. 659 [Sask.-Johnston, J.].

See generally *Maltezos v. Brouse* (1911) 2 O. W. N. 990 [see p. 994, *post*], and *McLennan v. Millington* (1897) 5 B. C. R. 345, where it was held that no damages lay for loss in a tobacconist's stock purchased to be sold from the premises.

## FUTURE LEASE.

ARTICLE 20.—When a lease is made to commence at a future date the lessee has only an *interesse*

*termini* until that date arrives and he can complete his title by entry.

[Authorities: 18 Hals. s. 861].

A reversionary lease to commence at a period more than 21 years from the date of the grant confers a vested interest and is not void under the rule against perpetuities: *Mann, Crossman & Paulin, Ltd. v. Land Registrar* [1918] 1 Ch. 203; 87 L. J. Ch. 81; 117 L. T. 705; 62 S. J. 84; 34 T. L. R. 39 [Neville, J.].

Reference should be made to the cases noted at pp. 5 and 172.

### UNDER LEASES.

ARTICLE 21.—Unless there is an express agreement to the contrary any lessee may underlet the demised premises for any period less than the residue of his own term.

[Authorities: Bac. Abr. tit. Leases, 18 Hals. s. 1105, s. 863.]

#### *An Express Agreement to the Contrary.*

For covenants against sub-letting without leave, see Article 139, cases where leave is unreasonably withheld are dealt with in Article 140.

#### *Any Lessee.*

A tenant for years who is at liberty to sub-let may demise for any less term than he has himself at such rent and subject to such covenants as may be agreed upon.

#### *For any Less Term than he has Himself.*

If the tenant part with his whole term or make a lease for a period exceeding his whole term, it will as to *his* lessor amount to an *assignment* of the lease, as to which see Article 138, p. 1033, *post*.



Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has the right to sell, convey or otherwise deal with his interest, unless he be controlled by the terms of his grant (*Doe d. Mitchinson v. Carter* (1790) 8 Term. Rep. 57). A power of sub-letting is incident to the estate of a lessee, unless expressly restrained, and a covenant restraining assignment of a lease would not prevent under-letting, unless the words forbid an assignment for any part of the term: *Church v. Brown* (1808) 15 Ves. 249; *Grove v. Portal* [1902] 1 Ch. 727.

“Every tenant, except a tenant at will or at sufferance, has a right, in the absence of a contract to the contrary, to make a sub-tenancy, as incident to his tenancy” (Woodfall, *Landlord and Tenant* (13th ed.) 17). Even in the case of a tenant at will or at sufferance a species of limited tenancy by estoppel may arise as between himself and his lessee.

“A sub-letting must be carefully distinguished from an assignment of the lease. The latter in effect substitutes the assignee in the place of and invests him with all the rights and liabilities of the lessee. On the other hand a sub-lessee has no rights or direct liabilities under the original lease, since there is no privity of contract or estate between him and the original lessor: *Lawler v. Sutherland* (1852) 9 U. C. R. 205. He is merely the tenant of the original lessee, between whom and himself the ordinary relationship of landlord and tenant exists. Indirectly, however, his occupancy may be materially endangered by the course of conduct of his immediate landlord — the original lessee.” A lessor makes a demise to a lessee on certain terms. The lessee makes an under-lease to a sub-lessee on other terms. There is nothing dishonest or dishonourable in the sub-lessee entering on the demised premises on the terms contained in the sub-lease, and as between him and his sub-lessor he is entitled to remain in upon those terms. If the terms of the head-lease are more onerous than those of the sub-lease, and the sub-lessor fails to perform them, difficulties no doubt arise, but there is no legal liability

on the under-lessee to perform the obligations in the superior lease apart from this, that if he fails to perform them he may experience unpleasant consequences. If, for example, the sub-lessor fails to pay the rent to the superior landlord, the sub-lessee may find his goods distrained on by the superior landlord. So if the power of re-entry arises owing to the sub-lessor not having performed the covenants in the superior lease, the sub-lessee may find himself ejected. But, apart from that, there is no legal obligation on the sub-lessee," per *Stirling, L.J.*, in *Hurd v. Blow* [1901] 2 Ch. 721, at 726.

Where there is a sub-lease in the strict sense of the term, *i.e.*, when the whole interest of the lessee is not transferred to the sub-lessee, the latter is not liable to the original lessor upon the covenants in the original lease: *Holford v. Hatch* (1779) 1 Doug. 183; *Derby v. Taylor* (1801) 1 East. 502; *Lawler v. Sutherland, supra*.

In order that an instrument may operate as an under-lease, a reversion must be retained in the under-lessor; therefore the under-lease must be for a period less in point of time than the term of the lessor. The under-lessor must except the last day or the last hour or some other period of the term and the reservation generally of a day, not the last day, does not give the character of a sub-lease; the document operates as an assignment: *Jameson v. London and Canadian Loan and Agency Co.* (1897) 27 S. C. R. 435; 17 Occ. N. 320, reversing the judgment of the Court of Appeal (1896) 23 A. R. 602; 16 Occ. N. 285, and restoring the judgment of *Robertson, J.*, and a Divisional Court. *Ib.* It should be observed that the mortgage of lease conveyed the lease and the benefit of all the covenants contained in it—which included one for renewal—*habendum* unto the mortgagees, etc., for the residue of the term less one day thereof and all renewals, etc. It was held that the *habendum* was void as being repugnant to the grant, following *Germain (Jermyn) v. Orchard* (1691) 1 Salk. 346; *Shower, P. C.*, 4th ed., 252; *Allen* 528.

It was also pointed out that the *habendum* itself did not reserve a reversion to the mortgageor. If it were

read as doing so it would be inconsistent with itself and therefore void: reference to *Doe d. Myers v. Marsh* (1852) 9 U. C. R. 242; Touchstone, p. 114.

As to the necessity for a reversion in Ontario, see p. 2, *ante*.

The sub-lessor should covenant to perform the covenants in the original lease, taking a covenant from the sub-lessee to perform such as devolve upon him: see *Doughty v. Bowman* (1848) 11 Q. B. 444; 17 L. J. (Q. B.) 111; *Piggott v. Stratton* (1859) 1 De G. F. & J. 33; 29 L. J. Ch. 1.

But if the dates of the lease and sub-lease are different and the covenants in the one are repeated verbatim in the other, the legal effect will be different, at all events as regards a general covenant to repair, which is construed with reference to the condition of the premises when the covenant begins to operate: *Penley v. Watts* (1841) 7 M. & W. 601; *Walker v. Hatton* (1842) 10 M. & W. 249; *Sweet v. Seager* (1857) 2 C. B. N. S. 119; *Logan v. Hall* (1847) 4 C. B. 598; *Pontifex v. Foord* (1884) 12 Q. B. D. 152; 53 L. J. Q. B. 321.

Where an under-lease is to contain the usual covenants, including a covenant not to assign or underlet without the consent of the lessee, together with such other covenants as are contained in the lease under which the premises are held, the covenants of the original lease must be inserted in the under-lease, and where the former contains a covenant against assigning without leave, the under-lessee must agree not to assign, etc., without the consent of the original lessor: *Haywood v. Silber* (1884) 30 Ch. D. 404; 34 W. R. 114.

It is often the intention that the sub-tenant shall assume the same obligations as the original lessee has undertaken in his lease. Such a contract of a sub-tenant to perform the covenants of the head-lease is a contract of indemnity, and when the sub-lessor is sued by his lessor on the covenants of the lease he is entitled to recover from the sub-lessee all the costs of the action reasonably defended: *Hornby v. Cardwell* (1881) 8 Q. B.

D. 329; 51 L. J. Q. B. 89 [C.A.]. The sub-lessee may in such case be brought in as a third party, where his covenant is strictly one of indemnity: *Pontifex v. Foord*, *supra*; *Catton v. Bennett* (1884) 26 Ch. D. 161. The same principle applies when the sub-interest is created by assignment instead of by under-lease: *Byrne v. Brown* (1889) 22 Q. B. D. 657; 58 L. J. (Q. B.) 410.

When a parol contract is made for the grant of an under-lease subject to a question of title, possession taken with the knowledge of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances, such as raising objections to the title at the time possession is taken. But where a copy of the original lease is sent to the grantee's solicitors, objections not then raised will be waived by the possession. The grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they are: *Hyde v. Warden* (1877) 3 Ex. D. 72; 47 L. J. (Q. B.) 121.

"Whoever wants to be secure when he takes a lease should enquire after and examine the title deeds," per Mansfield, L.C., in *Keech v. Hall* (1778) 1 Doug. 21, at 23. Accordingly on the grant of a sub-lease by a lessee the intending sub-lessee has the right to and should as a matter of precaution inspect the lessee's lease: *Gosling v. Woolf* [1892] 1 Q. B. 39; 68 L. T. 89. See the remarks of Lord Russell, C.J., in *Baynes v. Lloyd* [1895] 1 Q. B. 820, at 823.

Where an under-lessee accepts a lease without looking into the lessor's title, and it turns out that the latter's term is not equal to that granted to the under-lessee, the latter is not entitled to compensation, nor will there be any breach of the covenant for quiet enjoyment when the original lessor enters: *Besley v. Besley* (1875) 9 Ch. D. 103; 38 L. T. 844.

"A purchaser must at his peril ascertain that the intended lessor has sufficient title to demise for the proposed term," per Malins, V.C., in *Besley v. Besley*, *supra*,

at p. 111. See, also, *Clayton v. Leech* (1889) 41 Ch. D. 103; 61 L. T. 69, and *Woods v. Opsal* [p. 80, *ante*].

A lessee is bound to inquire into and is fixed with notice of all covenants into which his lessor has entered in respect of the land. Where the deed to the lessor, who was owner in fee, contained a restriction against selling spirituous liquors, the lessee was held bound by this provision: *Feilden v. Slater* (1869) L. R. 7 Ep. 523; *Wilson v. Hart* (1866) L. R. 1 Ch. 463; *Spencer v. Marriott* (1823) 1 B. & C. 457; *Dennett v. Atherton* (1872) L. R. 7 Q. B. 316. So the under-lessee of a person, without actual notice, who has covenanted not to carry on a particular trade on the demised property, will be restrained from carrying it on, although such covenant was not contained in the original lease, but only in an assignment thereof, and although the under-lessee had no actual or even constructive notice of it when he took his under-lease: *Clements v. Welles* (1865) L. R. 1 Eq. 200; see also *Parker v. Whyte* (1863) 1 H. & M. 167. An assignee of the under-lessee will be in the same position: *Clements v. Welles*, *supra*.

So a sub-lessee is bound by restrictive covenants entered into by the head landlord when he purchased the freehold, although neither the mesne landlord nor the sub-lessee has actual notice of them: *Thornevell v. Johnson* (1881) 50 L. J. Ch. 641; 44 L. T. 768.

Where an under-lessee is expressly informed that the provisions of the superior lease prohibit certain alterations which he wishes to make in the premises, he has no remedy against his own lessor for any damages sustained by the refusal of the superior landlord to allow the alterations: *Brooks v. Tolputt* (1884) 1 T. L. R. 39.

By s. 10 of the Landlord and Tenant Act. R. S. O., 1914, c. 155:—

“(1) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion;”

“(2) This section applies only if and so far as the contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained;”

“(3) This section shall apply only to contracts made after the 24th day of March 1919.”

[This section first appeared in the Act in 1911 (see 1 Geo. V. c. 37, s. 10); it was copied from (Imp.) 44-45, Vict. c. 41, s. 13, as to which see Hals. s. 828].

The interest of a sub-tenant holding for no definite period will determine when the interest of his lessor expires, provided the interest of the latter is limited by contract to a certain day. The sub-tenant, continuing thereafter, will be an overholding tenant: *Magee v. Gilmour* (1889) 17 O. R. 620; affirmed, 17 A. R. 27; 18 S. C. R. 579.

A lessee of certain premises, finding sub-lessees of a former lessee in possession during the period for which he was liable to payment, applied to their lessor and demanded possession, and afterwards, finding that they had paid rent to the latter, received the proportion due him for the period of the occupation, and it was held that this was no recognition of a tenancy: *Roaf v. Garden* (1872) 23 U. C. C. P. 59.

A landlord issued a distress warrant for rent after the expiry of the term, and certain sub-tenants of the lessee, without the concurrence of their immediate lessor, who had tried to dislodge them and refused to receive rent from them, after the expiry of the term paid the rent demanded to the landlord's bailiff, not as being due by themselves, but as being due by their lessor, and the warrant recognized the latter as being tenant on the day of its date some months after the expiry of the term, but did not recognize the sub-tenant's rights in any way. In an action of ejectment the latter disclaimed being tenants under the landlord and insisted that they were still under their own lessor; it was held that the payment of the rent did not under the circumstances establish a new tenancy between the sub-tenants and

their lessor even if the latter became tenant of the landlord after the expiry of his original term, which was not shown: *Magee v. Gilmour, supra*.

Where a superior landlord distrains on a sub-lessee for rent due to him from the mesne lessee and the sub-lessee owes rent to his immediate lessor the amount realized by the distress is a satisfaction *pro tanto* of the rent due by the sub-lessee to his landlord, and this is so not only when the sub-lessee pays out the distress but also when goods belonging to him are sold under the distress. The sub-lessee has an action for damages on a covenant by his lessor to pay the rent to the superior landlord: *O'Donoghue v. Coalbrook Co.* (1872) 26 L. T. 806 [Ex. Ch.].

A lessee of land assigned part to A. for the residue of the term, and another part to B. for the residue of the term less ten days at apportioned rates, covenanting in both cases to pay the rent due to the original lessor and to indemnify. The lessee having become bankrupt A., on the application of the lessor and threat of distraint, paid the whole rent under the original lease, and it was held that as A. and B. were not liable to a common demand and there was no one entitled to sue B. for his share of the rent, A. had no right of contribution against B.: *Johnson v. Wild* (1890) 44 Ch. D. 146; 59 L. J. (Ch.) 322.

The relation of landlord and tenant makes the tenant a purchaser for valuable consideration, and he has all the advantages of such purchaser. A lessee whose term had about ten years yet to run sub-let, and agreed with the sub-lessee not to raise the rent, or to give notice to quit so long as the rent was paid, and also agreed verbally with the sub-lessee to let him remain in the premises for such term of years (not exceeding the lessee's term) as the sub-lessee might desire to continue tenant thereof. The sub-lessee entered and paid rent and it was held that the Statute of Frauds was no bar in equity to the claim of the sub-lessee for the residue of the lessee's term, and that the sub-lessee was not tenant from year to year,

but had a right to retain possession as long as his landlord's interest continued and to enforce that right in equity: *Re King* (1873) L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

Where the interest of a sub-lessee, holding under a tenant for a term of years, expires, and he continues on as tenant from year to year until the expiration of the sub-lessor's title, and is then notified that he cannot any longer be considered as sub-lessee, the fact that his lessor obtains a renewal does not give the sub-lessee a right to a prolongation of his tenancy from year to year: *Weller v. Spiers* (1872) 26 L. T. 866; 20 W. R. 772.

A lessee covenanted with his under-lessee that in case he obtained an extension of the term or a renewal of the lease he would give the under-lessee a like renewal or extension of his term. A lease was subsequently taken of an extended term in the name of a trustee for the separate use of the lessee's wife, and it was held that the under-lessee could not compel an extension in respect of the term so taken as the suit was virtually one for specific performance against persons who were not parties to the original contract to renew the under-lease: *Lumley v. Timms* (1873) 28 L. T. 157; 21 W. R. 319.

Where the lease of a theatre bound the lessee to use it for theatrical purposes, and the lessee sub-let certain boxes and covenanted for quiet enjoyment, but did not covenant to perform the covenants of the original lease, it was held that without the consent of the sub-lessee the theatre could not be temporarily let for the purpose of holding religious meetings, nor had the sub-lessor any right to enter the boxes; but as the diversion from theatrical purposes was only for three months, the Court refused to grant an injunction, and left the sub-lessee to his action for damages: *Leader v. Moody* (1875) L. R. 20 Eq. 145; 44 L. J. Ch. 711.

The effect of forfeiture or surrender of the original lease on the under-lease are dealt with at pp. 767 and 688, *post*, and relief against Forfeiture at p. 768, *post*.



Where a lessee is prohibited from sub-letting, the lessor only can take advantage of the breach. The lessee cannot set aside his sub-lease on the ground that in making it he violated a covenant to his lessor: *Henderson v. Torrance* (1846) 2 U. C. R. 402; see 1 Wms. Saund. Ed. 1871, p. 442.

So a person who becomes sub-lessee is bound by the provisions and stipulations in the lease, and the superior landlord can enforce the covenants in the lease against him. Where such a lease contained an undertaking by the superior landlord "at the expiration of the term" to pay for certain hay and straw, and there was a sub-lease without consent, and afterwards the sub-lessee became bankrupt and the lease was forfeited, it was held that there was no obligation to pay for the hay and straw, for the term had not "expired" within the meaning of the covenant: *Silcock v. Farmer* (1882) 46 L. T. 404 (C. A.). But see *Ex parte Morrish* (1882) 47 L. T. 26, in which case Coleridge, C.J., declined to follow *Silcock v. Farmer*.

Where the owner of the reversion in a theatre, by an order in a winding-up proceeding, obtained the lease and property, except certain boxes and stalls therein belonging to a third person, it was held that he could only exclude the owner of the boxes and stalls, by bringing an action for the recovery of possession where third parties would have notice and an opportunity of appearing: *Leader v. Hayes* (1886) 54 L. T. 204.

When a lessee grants an under-lease securing a rent which is incident to the reversion on the under-lease, that rent and that reversion and the benefit of all the covenants are estates and property and rights which cannot pass by a subsequent mere assignment of the original term, nor unless expressly assigned: *Franklin v. Howes* (1871) 24 L. T. 348; 19 W. R. 581.

The Court will not compel a lessee specifically to perform an agreement to sell his interest to a sub-lessee of part when the result would be to force the lessee to commit a breach of a covenant not to assign without license: *Willmott v. Barber* (1880) 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

## CHAPTER IV.

### THE VARIOUS TENANCIES.

ARTICLE 22.—*Terms of Years.*

ARTICLE 23.—*Tenancy from Year to Year.*

ARTICLE 24.—*Implied Tenancy from Year to Year.*

Quarterly Tenancy.

Monthly Tenancy.

Weekly Tenancy.

ARTICLE 25.—*Tenancy at Will.*

ARTICLE 26.—*Tenancy at Sufferance.*

ARTICLE 27.—*Tenancy for Life.*

### TERMS OF YEARS.

ARTICLE 22.—Tenant for a “term of years” is where a lease is made for any certain period of time such as five years, one year, one-half year, and so on.

[Authorities: *Re Lyons v. McVeity* (1919) 46 O. L. R. 148, 17 O. W. N., 49 D. L. R. 635. (App. Div.), specially noted at p. 8, *ante*, 14 Ency. L. of Eng. 62; 5 *Ib.* 334; 7 *Ib.* 633; 8 *Ib.* 94.]

A term of 14 months was held, in *Lyons v. McVeity* (*supra*), to be a “term of years.”

In *McBride v. Ireson* (1915) 35 O. L. R. 173 [App. Div.] 9 O. W. N. 299, it was held on the facts that the tenancy was for 6 months certain and not from month to month.

See *Fletcher v. Lyons* [1919] 3 W. W. R. 381 [App. Div.—Alta.], where it was held that there was no tenancy for one year created—this case is noted, p. 209, *post*.

### TENANCY FROM YEAR TO YEAR.

ARTICLE 23.—A tenant from year to year is one who holds under a demise express or implied for a term which may be determined at the end of the first

or any subsequent year of the tenancy, either by the landlord or the tenant by a regular notice to quit. If no such notice be given, the tenancy will continue from year to year for any number of years until surrendered or extinguished by the Statute of Limitations or the lessor's title ceases. It will not be put an end to by the death of either party where the lessor's estate continues.

[Authorities: 18 Hals. s. 905; 7 Encyc. Laws of England, p. 638.]

*An Express Demise.*

Where parties expressly agree upon a tenancy from a given date "from year to year," such a tenancy is created and may be determined by notice at the end of the first or any subsequent year, unless the parties use expressions showing that they contemplate a tenancy for two years at least: *Doe d. Clarke v. Smaridge* (1845) 7 Q. B. 957; 14 L. J. Q. B. 327; *Doe d. Plumer v. Mainby* (1847) 10 Q. B. 473.

Thus if land be let "for one year, and so on from year to year," the tenancy will not be determinable until the end of the second year: *Doe d. Chadborn v. Green* (1839) 9 A. & E. 658; *R. v. Chawton* (1841) 1 Q. B. 247; *Denn d. Jacklin v. Cartwright* (1803) 4 East, 29, 31; *Birch v. Wright* (1786) 1 T. R. 378; *Johnston v. Huddleston* (1825) 4 B. & C. 922.

The parties to a yearly tenancy may agree that it may be determined on whatever notice they like; and such a provision is not inconsistent with there being a yearly tenancy (one month's notice); *Re Rabinovitch and Booth* (1914) 31 O. L. R. 88; 19 D. L. R. 296; 6 O. W. N. 58 (App. Div.), following *In re Threlfall Ex parte Queens Benefit Building Society* (1880) 16 Ch. D. 274, 50 L. J. (Ch.) 318.

So a stipulation for three months' notice is not inconsistent with a yearly tenancy: *King v. Eversfield* [1897] 2 Q. B. 475; *Dixon v. Bradford and District Railway Servants' Coal Supply Society* [1904], 1 K. B. 444, followed in *Lewis v. Baker* (1905) 2 K. B. 576; 21 T. L. R. 539; 25

C. L. T. 383; [1906] 2 K. B. 599; 22 T. L. R. 680 [C.A.]; 26 C. L. T. 638: *Allison v. Scargill* (1920) 89 L. J. (K. B.) 1084.]

For provisions inconsistent: see *Tooker v. Smith* (1857) 1 H. & N. 732; *Doe d. Warner v. Browne* (1807) 8 East 165.

### *An Implied Demise.*

See Article 24.

A tenancy from year to year may arise where there is a general letting for no fixed term: *Roe d. Bree v. Lees* (1778) 2 W. Blac. 1171.

A letting at an annual rent constitutes a yearly tenancy which continues at the same rent for the second year if the tenant remain in possession of the premises: *McClenaghan v. Barker* (1844) 1 U. C. R. 26.

Payment of rent quarterly is only *prima facie*, not conclusive, evidence of a yearly tenancy: *Halliburton v. Molloy* (1852) 2 N. S. R. 246.

After an action of ejectment was commenced for the forfeiture of the lease, the landlord distrained for and received rent subsequently accruing due, and it was held that such course did not *per se* set up the former tenancy which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year: *McMullen v. Vannato* (1893) 24 O. R. 625.

Where a tenant for life demises for years and dies before the expiration of the period mentioned in the lease, and the lessee continues in possession after the cesser of the interest of the reversioner and accepts rent from his heir, this only makes a tenancy from year to year: *Legg v. McCarthy*, Sup. Ct. Newfoundland, 129.

There was a lease of land to A. for two years from the 1st of May, 1848, with an agreement to renew the lease or pay for the improvements. A. assigned to B., who remained in possession till August, 1851, and then assigned to C., subject to the payment of the rent due. Before taking the assignment C. wrote to the lessor enquiring about his title to the land and whether he, C., would be safe in

paying the rent to B. The lessor answered that he thought he (the lessor) had a right to look to C. for the rent, to which C. replied, admitting his liability for the rent, and that the lessor was the owner of the land; it was held that the letter admitted a tenancy from year to year at the rent reserved in the lease to A., and that it was properly left to the jury to find whether such a tenancy existed: *Doe d. Peters v. Pelletier* (1858) 9 N. B. R. 33.

*Which may be Determined.*

See Chapter XIII., Article 107, *post* p. 660.

*Until Surrendered.*

See p. 661, *post*.

*Statute of Limitations.*

See Chapter XIV., Article 134, *post* p. 898.

*The Lessor's Title Ceases.*

In a tenancy from year to year the law implies no covenant for quiet enjoyment against eviction by title paramount on the expiration of the landlord's interest, and if on the determination of the landlord's title the tenant is evicted by the superior landlord, he has no right of action against his own landlord for damages for such eviction without an express covenant to that effect: *Schwartz v. Locket* (1889) 61 L. T. 719; 38 W. R. 142; *Penfold v. Abbott* (1862) 32 L. J. Q. B. 67; *Adams v. Gibney* (1830) 6 Bing. 656.

As has already been seen [p. 105, *ante*] since the Judicature Act, the rule no longer holds that a person occupying under an executory agreement for a lease [or a "void" lease] of which the Court would decree specific performance, is only made tenant from year to year by the payment of rent, but he is to be treated in every Court as holding under the terms of the agreement, and the

tenancy is subject to the same incidents, including the right of distress, as if a lease had been granted: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9; 52 L. J. Ch. 2 (C.A.). The decision in this case abolishes the tenancy from year to year which formerly arose from the fact of a person being let into possession under an agreement for a lease and paying rent, as well as that which arose in the case of a lease void because for more than three years and not under seal. Where, however, the agreement is one of which the Court would not decree specific performance, the old rule still prevails, and until payment of rent the tenancy is one at will and afterwards from year to year: [p. 105, *ante*], and the doctrine of *Walsh v. Lonsdale* can only be applied where the Court in which the action is brought has concurrent jurisdiction in law and equity [p. 106, *ante*]. In a County Court, not under the Judicature Act, and unable to decree specific performance, the rule does not apply [p. 106, *ante*].

### *The Continuity of the Tenancy.*

Formerly in the case of a tenancy from quarter to quarter, from month to month, or from week to week, there was in contemplation of law a fresh letting at the end of each period: *Gandy v. Jubber* (1865) 9 B. & S. 15; *Sandford v. Clarke* (1888) 21 Q. B. D. 398; 57 L. J. Q. B. 507. But this no longer holds, at all events in regard to a weekly tenancy: see *Bowen v. Anderson* [1894] 1 Q. B. 164; *Harvey v. Copeland* (1892) 30 L. R. Ir. 412; nor does it apply to a tenancy from year to year; *Gandy v. Jubber* (*ante*).

Such a tenancy is considered as one continuous term dating from its inception and not as a recurrence of yearly tenancies commencing anew each year: *Gandy v. Jubber* (*ante*), and see *Sherlock v. Milloy* (1893) 13 C. L. T. 370; [Co. Ct. (Lincoln)].

The continuity of the term is also material on the question whether the reversioner or the tenant be liable for a nuisance existing at the inception of the tenancy: see *Bowen v. Anderson* (*supra*). The general rule is

that the landlord is liable if the premises are defective when let, but if there were a fresh letting at the beginning of each week, it is obvious that he would be liable whether through his fault or not.

### THE IMPLIED TENANCY.

ARTICLE 24.—If a tenant for a term of at least one year hold over after the expiration of his term and pay rent, which is accepted, then if no other tenancy appear to have been agreed upon the presumption is that the tenancy so created is from year to year upon such of the terms of the former holding as are not inconsistent with an holding from year to year.

[Authorities: *Infra: Passim.*]

“*For a term of at least one year.*”

“There must be a valid lease for a year at least,” *per* Perdue, J.A., in *Richardson v. Urban Mutual Fire Insurance Co.* (1916) 26 M. R. 372 [C. A.] at p. 381, 10 W. W. R. 733, 28 D. L. R. 12.

#### *Holding Over.*

Upon the expiration of a term a tenant is bound to deliver up possession of the premises whether he has covenanted to do so or not—unless there be a new lease: *City of Toronto v. Ward* (1908) 18 O. L. R. 214: [Britton, J., at p. 220]. See also Article 126.

A tenant sometimes remains in possession after the expiration of his term. In such a case he may be (1) “an overholding tenant [see p. 887], or (2) a tenant at sufferance [see p. 210], or (3) a tenant from year to year [see p. 190], or (4) a tenant at sufferance first and later a tenant from year to year, or (5) in possession pending negotiations for a new lease, and so tenant at will or a tenant at sufferance and then at will [see p. 203]; it is usually a matter of evidence in each case.

“*The Presumption is . . .*”

A tenancy from year to year is not created by (1) payment and receipt of rent at the previous rate, (2) the mere fact of holding over.

These are simply matters of evidence from which the Court may find the fact. The question depends upon the circumstances of the case and the particular dealings between the parties: *Idington v. Douglas* (1903) 6 O. L. R. 266, 2 O. W. R. 734, 23 Occ. N. 286 (Falconbridge, C.J. K.B.) followed in *Winnipeg Land Corporation v. Witcher* (1905) 15 M. R. 423, 1 W. L. R. 551 (Full Court); *Bank of Nova Scotia v. McDougall* (1913) 23 W. L. R. 753; 4 W. W. R. 365 (Alta.) and see *Laba v. McGovern* (1919) 44 D. L. R. 551, 52 N. S. R. 440. [Full Court.]

If a tenant for years hold over after his term, and pay rent, which is accepted, he becomes a tenant from year to year. The receipt of rent is evidence to go to a jury that a tenancy was subsisting and if *no other tenancy appear to have been agreed upon the presumption is that the tenancy is from year to year*: *Roe dem Brune v. Prideaux* (1808) 10 East. 158 (*per* Lord Ellenborough, at p. 187) approved: *Young v. Bank of Nova Scotia* (1916) 34 O. L. R. 176; 23 D. L. R. 854; 8 O. W. N. 505 [App. Div.]; *Re Rabinovitch & Booth* (1914) 31 O. L. R. 88 (App. Div.); 19 D. L. R. 296; 6 O. W. N. 58 [App. Div.]

“If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year”: *Right v. Darby* (1786) 1 T. R. 159 (Lord Mansfield) followed in *Richardson v. Urban Mutual Fire Insurance Co.* (1916) 26 M. R. 372 (C.A.), which also considered *Dougal v. McCarthy* [1893] 1 Q. B. 736: *Young v. Bank of Nova Scotia* (*ante* p. 31).

Premises were let for a year from February 1, 1891, at a rent of £140, payable quarterly in advance on the 14th of February, May, August and November. The tenants remained in possession after the expiration of



the lease, and the landlord wrote them on 25th February, 1892, demanding £35 for a quarter's rent due in advance. On March 26th the tenants wrote that it was "their intention to discontinue their present tenancy," and it was held in the absence of any evidence to the contrary there was an implication of a tenancy from year to year on the terms of the former lease so far as not inconsistent with such tenancy: *Dougal v. McCarthy* [1893] 1 Q. B. 736 and see *Bradbury v. Grimble & Co. Lim.* (1920) 89 L. J. Ch. 645.

A tenant under a lease for a year had a right of renewal upon giving two months' notice. He did not give the notice, but the landlord accepted rent from him for a portion of the second year. Scott, J., held a tenancy for the whole of that year was constituted: *Le Corporation Episcopale C. R. of St. Albert v. R. J. Sheppard & Co. Ltd.* (1913) 3 W. W. R. 814 (Alta.), referring to *Bishop v. Howard* (1823) 2 B. & C. 100, 1 L. J. (O.S.) K. B. 243.

When a demise is for a year, or years and a portion of a year, and the tenant holds over and pays rent after the expiration of the original demise, a tenancy from year to year is created: *Croft v. Blay, Lim.* (1919) 88 L. J. Ch. 153 [Astbury, J.]: and see p. 776 *post*.

A husband conveyed a farm, upon which they lived, to his wife, and farmed it, paying her \$600 for her share of the 1917 crop. In 1917 she left him. Held, that by so paying rent a tenancy from year to year must be presumed, and the husband was liable to the wife for rent for 1918: *Adolf v. Adolf* [1919] 1 W. W. R. 878 [Sask.—Bigelow, J.].

See also *Telfer v. Brown* (1899) 19 Occ. N. 232 [Ont.—Street, J.]; *Neall v. Beadle* (1913) 107 L. T. 646; 57 Sol. J. 77 [Eve, J.]. *Ross v. Gavin* (1920) 17 O. W. N. 498 (Kelly, J.).

A letter from a landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient if the letter is not received by the tenant, to displace the tenancy from year to year which

arises by implication from the tenant's holding over and paying rent after the expiration of his term: *Gass v. McCammon* (1904) 6 Terr. L. R. 96.

In *Standard Clothing Co. v. Saskatchewan Valley Land Co.* (1911) 17 W. L. R. 544 [Alta.—Ct. en B.], it was held upon the evidence that lessees for a year certain held over as tenants at will.

Where a tenant at will was in quiet possession only one year, and paid rent for one year only, the acceptance of the rent by the landlord did not change the tenancy at will into a yearly tenancy: *Mather & Mann v. Ross* (1916) 33 W. L. R. 735; 9 W. W. R. 1359 [Sask.—McKay, J.].

In *Re Hardisty and Bishopric* (1905) 2 W. L. R. 21; 25 C. L. T. 510 [N. W. T.—Scott, J.], a tenant who went into possession under a lease for one year and remained in possession after the expiration of the term and paid rent, which the landlord accepted, was a tenant from year to year: see *Winnipeg Land Corp'n v. Witcher*, p. 205, *post*.

*Dundas v. Osment* (1905) 1 W. L. R. 363; 25 C. L. T. 407 [Newlands, J.]: Held that a lease for one year, terminable upon a month's notice, created a tenancy for years, within the meaning of 4 Geo. II. c. 28 [see p. 883, *post*].

P., the lessee of certain business premises for a term of  $15\frac{3}{4}$  years, entered into a partnership with C. and E. P. to carry on business on the premises, which, by the partnership deed, were declared to be the property of P. The deed contained no provision as to the tenancy, but did contain a direction that all rent was to be paid out of the profits. [Neville, J.] Held that the case was governed by *Burdon v. Barkus* (1861) 3 Giff. 412; (1862) 4 D. F. & J. 42, and by *Benham v. Gray* (1847) 5 C. B. 138, and that the Court would infer a tenancy during the partnership, and not a tenancy from year to year, or a tenancy at will: *Pocock v. Carter* [1912] 1 Ch. 663; 106 L. T. 423; 56 S. J. 362; 81 L. J. Ch. 391.

### *Corporation Tenants.*

As has already appeared [p. 29, *ante*] a demise to a corporation, with certain exceptions, is not binding upon

the corporation unless executed by it under its corporate seal.

Where a valid lease to a corporation creating the relation of landlord and tenant is entered into, and possession taken under it, and the tenant holds over and pays rent which is accepted—the corporation becomes a tenant from year to year—no agreement under seal is necessary—as Riddell, J., said at p. 182, “a valid tenancy actually existing the consequences of overholding and paying rent are the same for a corporation tenant as any other”: *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 [App. Div.], distinguishing *Finlay v. Bristol and Exeter R. W. Co.* (1852) 7 Ex. 409, and *Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Ltd.* (1899) 31 O. R. 40, and following *Doe dem Pennington v. Tanriere* (1848) 12 Q. B. 998.

Where however a corporation which cannot enter into a binding lease except under seal [see p. 29], enters into possession under a parol agreement for a term certain, and then holds over afterwards, paying rent monthly, a tenancy from year to year cannot be implied from these circumstances, and the corporation will only be liable for use and occupation up to the time of quitting the premises: *Richardson v. Urban Mutual Fire Insce. Co.* (1916) 26 M. R. 372 (C.A.), following *Finlay v. Bristol, etc., Co. and Garland Mfg. Co. v. Northumberland, etc., Co.* (*supra*).

These cases are discussed at p. 31, *ante*.

*The terms of the former holding not inconsistent with a yearly holding.*

Tenants entered under a lease for one year, containing a stipulation that either party might terminate at the end of any month of the tenancy by giving one month's notice. They held over and became tenants from year to year. The Appellate Division considered the stipulation not to be inconsistent with the new tenancy, and held that the landlord's assignee might take advantage of it: *Re Rabinovitch & Booth* (1914) 31 O. L. R. 88; 19 D. L. R. 296; 6 O. W. N. 58 [App. Div.].

*Nichol v. Nelson* (1911) 19 W. L. R. 718; 1 W. W. R. 423; 4 Sask. L. R. 315 [Lamont, J.]. The tenant was in possession holding over after the expiry of a lease for one year, which contained a provision for re-entry if the rent was in arrears for two months. The tenant claimed to be a tenant from year to year and entitled to notice. It was held that he was subject to the terms of the lease and that the tenancy was terminated by bringing this action for possession.

The following covenants and provisions have been held applicable to and consistent with a tenancy created by holding over, so as to be extended to such tenancy by implication.

(1) A covenant to pay rent in advance: *Lee v. Smith* (1854) 9 Exch. 662; *Dougal v. McCarthy* [1893] 1 Q. B. 736.

(2) A stipulation for an abatement of rent in case of damage to the premises by fire: *Bennett v. Ireland* (1858) E. B. & E. 326.

(3) A covenant to keep the premises in repair: *Hett v. Janzen* (1892) 22 O. R. 414; *Richardson v. Gifford* (1834) 1 A. & E. 52; *Ecclesiastical Com. v. Merral* (1869) L. R. 4 Ex. 162, *Cole v. Kelly* [1920] 2 K. B. 106; 89 L. J. K. B. 819, including the obligation to rebuild in case the premises are burnt down: *Digby v. Atkinson* (1815) 4 Camp. 275.

(4) Stipulations as to the rotation of crops and other farming and husbandry covenants: *Doe v. Amey* (1840) 12 A. & E. 476; *Tooker v. Smith* (1857) 1 H. & N. 732.

(5) A stipulation that a tenant shall retain and sow a portion of a farm for his own benefit after the end of the term: *Hyatt v. Griffiths* (1851) 17 Q. B. 505.

(6) A covenant not to underlet the premises: *Crawley v. Price* (1875) L. R. 10 Q. B. 302.

(7) A stipulation that the tenancy may be determined "at any time hereafter" on giving six months' notice to quit: *Bridges v. Potts* (1864) 17 C. B. N. S. 314.

(8) And a proviso for re-entry on non-payment of rent or breach of covenant: *Thomas v. Packer* (1857) 1 H. & N. 669; *Doe v. Amey, supra*.

(9) Where the landlord and tenant could not agree upon the terms of the holding over other than the payment of rent, and that the terms of the old lease should not apply, it was held that the implied covenant to cultivate in a husbandlike manner applied: *Wedd v. Porter* [1916] 1 K. B. 91 (C.A.).

(10) An arbitration clause: *Morgan v. Harrison, Lim.* [1907] 2 Ch. 137; 76 L. J. Ch. 548.

A clause giving an option to purchase the fee is not, however, such a term: *Bradbury v. Grimble & Co., Lim.* (1920) 89 L. J. Ch. 645.

*Tenancies for fixed periods less than a year.*

A tenancy for a fixed period less than a year is usually governed by the same principles as a tenancy from year to year. It may be from quarter to quarter, month to month, or week to week. The holding over implies a term of the same duration as the original term with like conditions:

It is, in fact, but a tenancy for years, though but for a fractional part of a year.

In leases of houses and apartments for an indefinite period less than a year, the hiring will be construed to be quarterly, monthly or weekly, according to the circumstances of each case and the custom of the place or country. Of these circumstances the principal appears to be the payment of rent.

But where premises are let for an indefinite period, at a yearly rent, payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable at the end of any quarter: *R. v. Herstmonceaux* (1827) 7 B. & C. 551; 1 M. & R. 426; *Willesden v. Paddington* (1863) 3 B. & S. 593.

Therefore, where a tenancy was created of wharfs, warehouses, etc., at a certain rent per quarter, the tenancy to commence on the 14th June, the tenant paying a quarter's rent on that day and giving security for the payment of a quarter's rent in advance during his tenancy, it was held that he became tenant from quarter to

quarter, and not from year to year: *Wilkinson v. Hall* (1837) 3 Bing. N. C. 508.

So where the tenant is "always to be subject to quit at three months' notice," he will be deemed a quarterly tenant: *Kemp v. Derrett* (1814) 3 Camp. 510.

A demise at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy: *Huffell v. Armitstead* (1835) 7 C. & P. 56.

A purchased premises leased to B for a term of years by an unrecorded lease. A then demanded payment of rent on the date on which it had been paid to the prior owners. Held that B became a monthly tenant to A: *Tom Gung v. Fong Lee* (1915) 48 N. S. R. 317.

Where premises are let not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month: *Doe d. Landsell v. Gower* (1851) 17 Q. B. 589; 21 L. J. Q. B. 57.

A monthly tenancy may be created by attornment between a mortgagor and mortgagee, and such tenancy may be determinable on 14 days' notice: *Ex parte Voisey* (1882) 21 Ch. D. 442 (C.A.); 52 L. J. Ch. 121: see also p. 226 *post*.

In *Eastman v. Richard* (1899) 29 S. C. R. 438, the lessees offered to rent a store "for 11 months at the rate of \$400 a year." The offer was accepted and they went into possession and remained in possession for some time longer than 11 months. It was held that the tenancy was one from month to month after the original term ended, and a month's notice to quit was sufficient.

An agreement to rent a house "the first 3 months to be \$25 a month, the next 3 months \$30 a month, the months after to be \$35 a month," was held to constitute a monthly tenancy, not a tenancy from year to year: *Methodist Church v. Roach* (1908) 9 W. L. R. 23 [B.C.].

It is unreasonable that a term requiring the tenant to repair should be held applicable to a monthly tenancy following a prior lease: *Dugas v. City of St. Catharines* (1920) 17 O. W. N. 361 (Falconbridge C.J. K.B.).

## TENANCY AT WILL.

ARTICLE 25.—A tenancy at will is created where lands or tenements are let by one man to another to have and to hold to him at the will of either, by force of which lease the lessee is in possession.

[Authorities: 18 Hals. s. 899; 14 Ency. Laws of England, p. 804.]

The tenancy may be created by express agreement, thus a letting “so long as both parties please,” creates a tenancy at will: *Richardson v. Langridge* (1811) 4 Taunt. 128.

It may also—and more frequently does—arise by implication of law, as where a person enters or remains in possession by consent of the owner of the land.

As to the effect of an express agreement: see *Morgan v. William Harrison, Ltd.* [1907] 2 Ch. 137.

*The Will of Either.*

A tenancy at will arises only where the letting is for no certain term, but is to continue during the joint will of both parties and no longer. A landlord cannot by notice to quit during the currency of a term created by a written lease, convert a tenancy for one year into one at will: *Salesses v. Harrison* (1911) 10 E. L. R. 544; 41 N. B. R. 103; and a demise at the will of the lessor only does not create a tenancy at will: *In re Threlfall* (1880) 16 Ch. D. 274.

And see *per* Strong, J., in *Trust & Loan Co. v. Law-son* (1881) 10 S. C. R. 679, at p. 703 [6 A. R. 286].

An agreement that C. might occupy certain premises until a purchaser was found, he to pay taxes in the meantime, creates a tenancy at will: *East v. Clarke* (1915) 33 O. L. R. 624 (App. Div.); 7 O. W. N. 586 [Kelly, J.] 8 O. W. N. 342; 23 D. L. R. 74.

A tenancy at will was created when B. went into possession upon a promise from his father, the true owner, to give him the land: *Miller v. Baty* (1898) 18 Occ. N. 86 [Street, J.—Ont.].

And *McCowan v. Armstrong* (1902) 3 O. L. R. 100: 1 O. W. R. 28, 22 Occ. N. 54 (Meredith, C.J.), is a similar case: a son, in 1879, entered on a farm which his father had bought, intending as the son knew, to devise it to his son. The son remained in possession until his father's death in 1900, without paying rent or acknowledging his father's title. It was held he was a tenant at will: see this case, noted at p. 898, *post*, Limitation of Actions.

Where a lease expired, the landlord before accepting rent, told the tenants that he would not consent to any tenancy from year to year, but they might remain as they were on the expiration of the lease, and the tenants assented to this: it was held that they were not tenants from year to year, but tenants at will, although rent continued to be paid as under the lease: *Idington v. Douglas* (1903) 6 O. L. R. 266 (Falconbridge, C.J.K.B.).

See also *Sullivan v. Sweeny* (1908) 4 E. L. R. 492 [P.E.I.]; and *Stanier v. Fleming* (1893) 3 Terr. L. R. 223 [N.W.T.—Wetmore, C.J.], and *Stevens v. Jeffers* (1907) 3 E. L. R. 471; 38 N. B. R. 233.

In *Girroi v. Ronan* (1909) 7 E. L. R. 153 [N.S.], the defendant had given an absolute conveyance of his property to the plaintiff and remained in possession: later he claimed the conveyance was intended to be a mortgage. Held, it was not and that he remained in possession as tenant at will.

Possession of an upper room in a building retained by a former co-owner, who sold out to his other co-owners, and paid rent for one year, and then ceased, made him tenant at will: *Iredale v. Loudon* (1908) 40 S. C. R. 313 [Ont. Appeal]; and see this case noted at p. 907.

A mere permission to occupy land creates a tenancy at will: *Doe d. Hull v. Wood* (1845) 14 M. & W. 682; *Doe v. McWade* (1852) 2 U. C. C. P. 8.

B. was allowed by his father to occupy a certain lot, he paying taxes and being at liberty to take what timber was required for his own use. B. having violated the arrangement, the father's agent was sent to remove B. from the land, and B. thereupon undertook to observe the agreement for the future, and to give up possession when-



ever required so to do, and it was held that this agreement made B. tenant at will: *Ryan v. Ryan* (1881) 5 S. C. R. 387; 4 A. R. 563; 29 U. C. C. P. 449.

When a lease is invalid by reason of uncertainty in the duration of the term, it creates a tenancy at will, and on payment of rent from year to year: *Reeve v. Thompson* (1887) 14 O. R. 499; *Salesses v. Harrison*, ante p. 203.

K. owned lot 11 on Seaton Street, Toronto, and lot 10 adjoining. There was a house situate partly on each lot, and it appeared that K. and one A., under whom G. claimed, had mutually agreed that A. should occupy a part of the house, which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to G., and it was held that G. must be regarded either as tenant at will to or as occupying under a license from K., and could not be ejected without notice or a revocation of the license, and that in either case he would be entitled to a reasonable time to remove what he might have in the house: *Keys v. Guy* (1875) 36 U. C. R. 356.

#### *Negotiations for a Lease—Entry Pending.*

Where, prior to the expiration of the term, negotiations are commenced between the landlord and tenant looking to a new agreement, or a renewal, and such negotiations are continued after the expiration of the term, and the tenant remains in possession while they are going on, he is a tenant at will, not from year to year: *St. George Mansions v. King* (1910) 15 O. W. R. 427; 30 C. L. T. 561; 1 O. W. N. 300.

If the negotiations do not commence until after the expiration of the term, and the tenant holds over, he does so either as an overholding tenant or a tenant at sufferance. When negotiations are commenced, he becomes a tenant at will: *Idington v. Douglas* (1903) 6 O. L. R. 266 [Falconbridge, C.J.K.B.]; *Winnipeg Land Corp'n v. Witcher* (1905) 15 M. R. 423; 1 W. L. R. 551 [Full Court]; 25 C. L. T. 510.

Compare *Re Hardisty and Bishopric*, p. 198, *ante*, and see *Re Grant and Robertson* (1904) 8 O. L. R. 297: 3 O. W. R. 846: 24 C. L. T. 336 [Div. Ct.].

A tenant whose lease for a year expired on March 1st, 1904, continued to occupy the premises after that date. Before the rent for April (which was not payable in advance so far as can be ascertained from the report) became due, or was paid, the landlord gave notice that the rent commencing with the month of May would be increased \$5 a month. The Court [Dubuc, C.J. and Perdue, J.], held that at the time the notice was given the tenant was only holding under a tenancy at will, and did not need to determine whether after the notice was given the tenancy was from that time a tenancy from year to year at the increased rent: *Winnipeg Land Corporation v. Witcher* (*ante*).

W. entered into negotiations with a loan company, who were the owners of a farm, for a lease thereof to him. The terms were discussed, and, pending a lease to be prepared by the company's solicitor and executed by W., he was allowed to enter into possession, but admitted that until he executed the lease there was no completed agreement. A lease was accordingly prepared containing what the company understood were the terms which W. refused to execute. The company thereupon sold the land to L. and gave W. notice to quit, and it was held that L. was entitled to succeed, as W. was not in possession under any concluded agreement regarding the lease; he was merely in as tenant at will to the loan company, and this tenancy was determined by the notice to quit: *Lennox v. Westney* (1889) 17 O. R. 472.

This case was distinguished in *Grant v. McPherson* (1902) 1 O. W. R. 240: see p. 112, *ante*.

B., being in possession of land belonging to R., and negotiating for a lease, signed a memorandum which, after describing the property, stated as follows: "Twenty-five years \$50 a year, commencing from 1st September, 1880." This was also signed by R., and B. remained in possession more than a year afterwards, but the parties having disputed about the terms of the lease,

it was not executed and no rent was paid. It was held that this was not an agreement for a lease, but an actual demise at a fixed rent, creating a tenancy at will at the least, and R. was entitled to distrain: *Buckley v. Russell* (1884) 24 N. B. R. 205.

### *Entry under "Void" Leases.*

This subject has already been discussed under Article 11, p. 105, *ante*.

For the law applicable in cases where there is no jurisdiction to decree specific performance or where it will not be decreed, see *Gibboney v. Gibboney* (1875) 36 U. C. R. 236; *Doe d. Pennington v. Tanriere* (1848) 12 Q. B. 998, 1013 [see p. 199, *ante*]; *Wood v. Beard* (1876) 2 Ex. D. 30 [C.A.]; *Lyman v. Snarr* (1861) 10 U. C. C. P. 462; *Caverhill v. Orvis* (1862) 12 U. C. C. P. 392; *Chesnut v. Day* (1838) 6 O. S. 637; *Dougal v. McCarthy* [1893] 1 Q. B. 736; [C.A.]; *Brewing v. Berryman* (1873) 15 N. B. R. 115, and the other cases noted at p. 106, *ante*.

The general rule to be deduced from these cases is that a man entering under a void lease is a tenant at will under the terms of the lease in all other respects except the duration of the term; and when he pays, or agrees to pay any of the rent therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to, and not inconsistent with, a yearly tenancy.

### *Possession under an agreement to Purchase Land.*

Permission to a purchaser by agreement for sale of lands to take possession until default is made creates a tenancy: when default is made the tenancy becomes a tenancy at will: *Green v. Longhi* (1914) 7 W. W. R. 924 (Alta.).

And see *Stewart Bros. Farm Land Co. v. Schrader et al.* (1915) 8 W. W. R. 761 (Sask.—Elwood, J.), referred to at p. 7, *ante*.

In *Anderson v. Anderson* (1906) 37 N. B. R. 432; 1 E. L. R. 443; 26 C. L. T. 750, it was held that payment

of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will. Hannington, J., suggested that as between a vendor and a vendee in possession under an agreement of purchase, the vendor is substantially a mortgagee—and see this case at p. 908, *post*.

*Cobean v. Elliott* (1906) 11 O. L. R. 395; 1 O. W. R. 13, 495; 26 C. L. T. 117, [Div. Ct.], affirmed [Falconbridge, C.J.], who said the tenant “went into possession either under a contract of purchase or under other circumstances which constituted him tenant at will . . .” [See p. 905].

Where the purchaser is to have possession until default it amounts to a demise; but if, after default, the parties agree to refer all matters in difference to arbitration, this would it seems constitute the purchaser a tenant at will and entitle him to a demand of possession before action: *Black v. Allan* (1867), 17 U. C. C. P. 240.

If the purchaser in possession under a contract to purchase payable by instalments, with a stipulation for forfeiture if payment be not made on a particular day, make default in his payments, the subsequent receipt by the vendor of payments on account will waive the forfeiture, and he becomes tenant at will and a demand of possession is necessary: *Lundy v. Dovey* (1857) 7 U. C. C. P. 38.

A person admitted to possession pending a treaty of purchase, which is afterwards broken off, is a tenant at will: *Peacock v. Peacock* (1809) 16 Ves. Sr. 57; *Doe d. Kemp v. Garner* (1840) 1 U. C. R. 39; *Sutherland v. Walter* (1839) 3 N. B. R. 141; *Prince v. Moore* (1864) 14 U. C. C. P. 349.

So a person entering into possession under a parol agreement to purchase, is tenant at will or at sufferance: *Crooks v. Dickson* (1866) 15 U. C. C. P. 23.

But where interest is payable as a consideration for the use of the land, the purchaser in possession will before the time for payment of the principal be a tenant for years: *Cliff v. Connaway* (1838) 2 N. B. R. 574.

But unless there be some agreement of this kind a purchaser entering under his contract has no greater

estate than that of tenant at will: *Cliff v. Connaway* (*supra*), and if the agreement to purchase specifies no time for the continuance of the possession in the event of the purchase not being completed, the purchaser becomes tenant at will, and such tenancy must be determined by some act of the parties before he can be ejected on non-completion of the purchase: *Doe d. Crookshank v. Denny* (1854) 8 N. B. R. 50.

Where a person in possession of land entered into a written agreement to purchase, it was held that he was tenant at will and that the tenancy might be determined by a demand of possession, though the same was not made on the land: *Doe d. Holderness v. Little* (1853) 7 N. B. R. 558.

But in *Winslow v. Nugent* (1903) 36 N. B. R. 356 it was held that summary proceedings for ejectment could not be taken against such a tenant: see p. 928, *post*.

### *Mortgagors in Possession.*

A mortgagor remaining in possession upon the execution of a mortgage and until default is a tenant at will: *Pegg v. I. O. F.* (1901) 1 O. L. R. 97; 21 Occ. N. 158 [Div. Ct.]; and after default he continues in possession as tenant at will. See this case discussed at p. 232, *post*.

### *Miscellaneous Cases.*

In the spring of 1918, the defendant agreed to crop the plaintiff's land on shares. The plaintiff was trying to sell the land as the defendant knew, and during the season of 1918 sold it. No time had been fixed for the defendant to give up possession. In an action for possession it was held that the defendant was neither tenant for a year nor tenant at will, but that he was entitled to such occupation as was necessary to put in and harvest the crop for 1918: *Fletcher v. Lyons* [1919] 3 W. W. R. 381; 48 D. L. R. 365. [Alta.—App. Div.]

And see *Fabrie v. Hewlemaus* [1919] 2 W. W. R. 146 (Alta.—Walsh, J.), noted at p. 15, *ante*.

In *May v. Hainer* (1917) 40 O. L. R. 436 [App. Div.], an unsuccessful attempt was made by a grantee in trust of certain lands to have it declared that a daughter of the grantor for whom the grantee held in trust was a tenant at will, whose tenancy was determined by the entry of the grantee.

*The Statute of Limitations.*

See chapter XIV., *post*, p. 892.

*Determination of Tenancies at Will.*

See Article 122, p. 798, *post*.

TENANCY AT SUFFERANCE.

ARTICLE 26.—A tenant at sufferance is one who enters by lawful demise or title and afterwards wrongfully continues in possession without the assent or dissent of the person next entitled.

[Authorities: Co. Litt 57 *b* 270 (*b*); 18 Hals. s. 904: *Young v. Bank of Nova Scotia (infra)*,]

If a tenant for years hold over after his term and pay rent, he becomes a tenant from year to year, but until rent is paid and accepted, or some agreement for a new tenancy is made, he is tenant at sufferance only: *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 (App. Div.); 8 O. W. N. 505; 23 D. L. R. 854.

This rule applies no matter what the nature of the tenant's original estate: 18 Hals. s. 904.

So if the assignee of a tenant for years holds over after the expiration of the term: *Doe d. Patrick v. Beaufort* (1851) 6 Exch. 498; or a tenant from year to year holds over after the death of the lessor who was only tenant for life: *Doe d. Thomas v. Roberts* (1847) 16 M. & W. 778; or a tenant at will continues in possession after the entry of the lessor, which puts an end to the will: *Doe v. Turner* (1840) 7 M. & W. 226; 9 M. & W. 643; in all these cases the person remaining in possession will be a ten-

ant at sufferance; so will an under-tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over: *Simkin v. Ashurst* (1834) 4 Tyrw. 781; 1 C. M. & R. 261.

Where a person obtained possession of a house which was empty without the privity of the landlord, intending to take a lease of it from him, and some negotiations afterwards took place between them upon the subject, it was held that the relation of landlord and tenant never subsisted, but that if there was a tenancy of any sort it was on sufferance: *Doe v. Quigley* (1810). 2 Camp. 505.

An instrument in these terms, "I hereby certify that I remain in the house, No. 3 Swinton Street, belonging to W. G., on sufferance only, and agree to give him possession at any time he may require," does not create any tenancy: *Barry v. Goodman* (1837) 2 M. & W. 768.

Where a lease contains a covenant by the lessor to grant a renewal if the lessee should request it after the expiration of the term, and the lessee continues in possession without making such request, the case may be treated as the ordinary one of a tenant holding over, and he may be ejected without a demand of possession: *Dewson v. St. Clair* (1856) 14 U. C. R. 97.

A tenancy at sufferance continues until the parties create a new tenancy by fresh agreement express or implied. Slight evidence would be sufficient to show a change, for the relation is inconvenient and the tenant has no right to emblements: *Doe v. Turner* (*ante*), p. 210.

If the lessor accept rent as rent from a tenant at sufferance, or if a tenancy be otherwise acknowledged, he becomes tenant from year to year: *Doe d. Tucker v. Morse* (1830) 1 B. & Ad. 365; *Mann v. Lovejoy* (1826) Ry. & M. 355; *Doe d. Calvert v. Frowd* (1828) 4 Bing. 557; *Doe d. Clarke v. Smaridge* (1845) 7 Q. B. 957.

Many cases go to the extent that where a party makes default after being let into possession, under an agreement to purchase, he may be ejected without notice; and where parties after the expiry of the time for payment in a mortgage or agreement, or after forfeiture in a lease, remain on the premises without being recognized

as lawfully in possession, they are tenants at sufferance and not entitled to a demand of possession: *Lundy v. Dovey*, (1857) 7 U. C. C. P. 40.

See also *Gardner v. Holmes* [1918] 1 W. W. R. 456 26 B. C. R. 416; 38 D. L. R. 156 [C.A.—Howay, C.C.J.].

### *Determination.*

See Article 123, p. 804, *post*.

## TENANCY FOR LIFE.

ARTICLE 27.—A tenancy for life is where one is entitled to the benefit of property for the term of his or some other person's life.

[Authorities 2 Bl. Com. 120.]

This tenancy, as has already appeared [p. 61, *ante*] is a freehold tenancy. It is usually created by deed or will without reserving a rent or containing any of the usual incidents of a tenancy. But sometimes a tenancy for life is created with covenants for the payment of rent, and the other customary provisions.

A tenant for the life of another is commonly called "*Tenant pur autre vie*." Reference should be made to the provisions of the Settled Estates Acts noted at p. 55, *ante*.



## CHAPTER V.

### MORTGAGOR AND MORTGAGEE.

ARTICLE 28.—*Leases by Mortgagors and Mortgagees.*

ARTICLE 29.—*Leases by Mortgagees Under Statute.*

ARTICLE 30.—*Attornment Clauses in "Old System."—  
First Mortgage.*

Attornment clause in agreement for sale.

In crop payment agreement.

ARTICLE 31.—*Attornment Clauses in "Old System"—  
Second Mortgage.*

ARTICLE 32.—*Attornment Clauses in "New System"—  
"Mortgages."*

The peculiar Manitoba provision.

### LEASES BY MORTGAGORS AND MORTGAGEES.

ARTICLE 28.—To make a lease which will not be subject to the rights of either party to the indenture of mortgage it is necessary both mortgagor and mortgagee should join. So where there are several mortgages, all the mortgagees should join.

[Authorities: *First National Investment Co. v. Oddson* [1919] 3 W. W. R. 591 [Man.—Mathers, C.J.K.B.]; *Doe d. Barney v. Adams* (1832) 2 C. & J. 232; *Doe v. Bucknell* (1838) 8 C. & P. 566; *Quartermaine v. Selby* (1889) 5 T. L. R. 223 [C. A.]].

In *First National Investment Co. v. Oddson* [1919] 3 W. W. R. 591 [Man.] Mathers, C.J.K.B., said at p. 594: "The leases were subsequent to the plaintiff's mortgage, and consequently not binding upon it: *Falconbridge on Mortgages*, 255. Whether or not the plaintiff had notice of the leases, as alleged, it had the right to eject the defendants (tenants): *Keech d. Warne v. Hall* (1778) 1

Doug. (K. B.) 21; 1 Sm. L. C. 12th Ed., 577; unless the plaintiff and defendants entered into a new agreement express or implied pursuant to which the defendants had a right to retain possession: *Evans v. Elliott* (1838) 9 Ad. & El. 690; 1 Per. & D. 256; 8 L. J. (Q. B.) 51; *Towerson v. Jackson* [1891] 2 Q. B. 484; 61 L. J. (Q. B.) 36," and he held that an alleged agreement by which the tenants were to hold for the balance of their term without rent was not established, and if it were would be a mere *nudum pactum* and unenforceable.

By the Alberta Land Titles Act (1906) 6 Edw. VII. c. 24, s. 54:—

No such lease [see p. 94] of mortgaged or encumbered land shall be valid and binding against the mortgagee or encumbrancee unless the mortgagee or encumbrancee has consented to the lease prior to the same being registered or subsequently adopts the same."

The Saskatchewan provision is similar (1917) 7 Geo. V. (2 Sess.) c. 18, s. 92 (5).

### *Lease Made Prior to Mortgage.*

Where a lease is prior to a mortgage by the lessor and the tenant enters and pays rent, he cannot be prejudiced by any act done as holding under his lessor until he has notice of the mortgage, and such tenant, paying all rent and quitting the premises before notice, is not liable to mortgagees, who have become such during the term, though for holding over after the end of the term he would be liable, not having paid his lessor therefor: *McFarlane v. Buchanan* (1862) 12 U. C. C. P. 591; *Cook v. Moylan* (1847) 1 Exch. 67.

A mortgage made subsequent to a lease operates as a grant of the reversion, if the mortgage contains no redemise clause: *Dauphinais v. Clark* (1885) 3 M. R. 225; and carries with it as incidental to such reversion a right to rent and the benefit of the mortgagor's remedies for its recovery: *Rogers v. Humphreys* (1835) 4 A. & E. 299; *Trent v. Hunt* (1853) 9 Exch. 14.

But it seems evident that when the mortgage contains a redemise clause, it will operate as a re-grant of a part of the reversion to the mortgagor, entitling him to sue and distrain for the rent. There is no direct authority to this effect, but see *Holland v. Vanstone* (1867) 27 U. C. R. 15; *Harmer v. Bean* (1853) 3 C. & K. 307.

By agreement of all parties a lease prior to a mortgage may be made subsequent thereto: *Anderson v. Stevenson* (1888) 15 O. R. 563.

*The Situation where the Mortgagor alone makes the Lease.*

When the mortgagor makes a lease, the mortgagee may after default and *on the accrual of his right of re-entry* eject the mortgagor or any persons claiming under him without notice: *Doe d. Fisher v. Giles* (1829) 5 Bing. 421; *Doe d. Robey v. Maisey* (1828) 8 B. & C. 767; *Walmsley v. Milne* (1859) 7 C. B. N. S. 133; *Keech d. Warne v. Hall* (1778) 1 Doug. 21; *Lows v. Telford* (1876) 1 A. C. 414; *Weaver v. Belcher*, (1803) 3 East 449; *Gibbs v. Cruickshank* (1873) L. R. 8 C. P. 454; *Carpenter v. Parker* (1857) 3 C. B. N. S. 206.

A lease by a mortgagor is, therefore, subject to the mortgage; and perhaps the best definition of the position of the lessee is that he is a purchaser *pro tanto* of the equity of redemption for valuable consideration with notice and bound by the rule of *caveat emptor*: *Re King's Leasehold Estates* (1873) L. R. 16 Eq. 521; *Besley v. Besley* (1878) 9 Ch. D. 103; 38 L. T. 844; *Clayton v. Leech* (1889) 41 Ch. D. 103; 61 L. T. 69 [C.A.].

He is fixed with notice of all covenants into which his lessor has entered: *Feilden v. Slater* (1869) L. R. 7 Eq. 523; 38 L. J. (Ch.) 379; *Wilson v. Hart* (1866) L. R. 1 Ch. 463; and is bound by the terms of the contract between the mortgagor and mortgagee, and if by the indenture of mortgage the mortgagor is required to give up possession at any time without demand, the lessee also must do so, in the absence of any fresh tenancy between

him and the mortgagee: *Canada Permanent Building & Savings Society v. Byers* (1860) 19 U. C. C. P. 473.

Where subsequent to a mortgage the mortgagor agrees to grant a lease, the mortgagees may either adopt the agreement or repudiate it: *Corbett v. Plowden* (1884) 25 Ch. D. 678 [C. A.]; that is, after default, and the accrual of the mortgagee's right of entry; *Doe d. Fisher v. Giles* (*supra*). Then the lessee would be a *tortfeasor* as against the mortgagee: *Gibbs v. Cruickshank* (1873) L. R. 8 C. P. 454, 461.

### *Before Default.*

Where a mortgage contains a redemise clause under which the mortgagor is in possession, a lease made by such mortgagor is good until the mortgagee lawfully intervenes by reason of his mortgagor's default.

When granted the right of possession until default the mortgagor has a term: *Wilkinson v. Hall* (1837) 3 Bing. N. C. 508; *Ford v. Jones* (1862) 12 U. C. C. P. 358.

A stipulation that the mortgagor remain in possession until default operates as a redemise, and it is only after default that the mortgagor becomes liable to be treated as a tenant at sufferance: *Keech d. Warne v. Hall* (1778) 1 Doug. 21.

The redemise cannot be created without an affirmative covenant to hold for a determinate time: *Trust and L. Co. v. Lawrason* (1882) 10 S. C. R. 679.

Where a tenancy is created between the parties, the mortgagor would, under the cases already cited, become the immediate reversioner provided the demise be under seal: *Neale v. Mackenzie* (1836) 1 M. & W. 747, explained in *Holland v. Vanstone* (*supra*), and *Carey v. Bostwick* (1852) 10 U. C. R. 156.

The situation of the mortgagor under the tenancy or redemise is no doubt different from that of the second lessee and holder of the immediate reversion in *Holland v. Vanstone*. The lessee was not the original lessor; the mortgagor is such and may, perhaps, be said to retain a part of the reversion, notwithstanding the mortgage.

It is conceived that the fact that the privity remains would probably obviate the necessity of notice, and in this respect place him in a more favorable position than an ordinary assignee of the reversion.

### *The Statutes.*

By the Mortgages Act R. S. O. 1914, c. 112, s. 5.

“A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or sue or *distrain* for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person.”

### *Similar Legislation.*

This appears at p. 372, *post*.

### *The Application of the Acts.*

The Act does not seem to add anything to the leasing power of a mortgagor who has executed the ordinary statutory Short Forms mortgage. It only applies to cases where the mortgagor could not either in his own name or in conjunction with the mortgagee have brought an action: *Fairclough v. Marshall* (1878) 4 Ex. D. 45, Bramwell, L.J.; and a lessor's right to recover possession as against his lessee must be sought for in the lease.

The Act applies where the mortgagor is entitled to the rents for “the time being,” and it assumes a right in the mortgagee to take possession. Therefore it would not seem to apply where there is a redemise, giving the mortgagor the right to possession for a determinate

time. But after default the Act might operate if the mortgagee neglected to take possession and allowed the mortgagor to receive the rents.

*The Tenant May Attorn to the Mortgagee.*

The case of mortgagor and mortgagee is excepted from the provisions set out at p. 1029, *post*.

The result of *Evans v. Elliott* (1838) 9 A. & E. 342, and other cases, seems to be that in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and the terms of the tenancy are to be ascertained from the evidence which proves its existence, but that it does not lie in the power of the mortgagee by a mere notice to cause the tenant in possession to hold under him on the same terms on which he held under the mortgagor, or indeed upon any terms at all without his own consent, and that where the tenant does consent to hold under the mortgagee, a new tenancy is created, not a continuation of the old one between him and the mortgagor: Notes to *Moss v. Gallimore*, 1 Sm. L. C. (12th Ed.) 580; *Waddilove v. Barnett* (1836), 2 Bing. N. C. 38.

In New Brunswick a mortgagee may by notice in writing make the tenant under a demise by the mortgagor subsequent to the mortgage, his tenant, and thereby adopt the same: C. S. N. B. (1903), c. 153, s. 26.

The general rule is that if a mortgagee accepts a person as his tenant, to whom the mortgagor has granted a lease for years since the mortgage, that makes him only tenant from year to year to the mortgagee: *Doe v. Bucknell* (1838) 8 C. & P. 566; *Carpenter v. Parker* (1857) 3 C. B. N. S. 232, 235. Such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to a yearly tenancy: *Doe v. Amey* (1840) 12 A. & E. 476.

Where the lease is subsequent to the mortgage and the tenant has paid rent to the mortgagee and become

tenant to him, he cannot be ejected by the mortgagor though the latter delivered possession to him: *Diffin v. Simpson* (1846) 5 N. B. R. 194.

The mortgagee cannot distrain or sue for the rent or for use and occupation unless a new tenancy has been created between him and the tenant in possession by an attornment or otherwise: see p. 373, *post*.

The mere fact of the tenant remaining in possession after notice from the mortgagee to pay the rent to him, is not evidence of an agreement that he should become tenant to the mortgagee: *Towerson v. Jackson* [1891] 2 Q. B. 484; 61 L. J. (Q. B.) 36 [C. A.]; *Evans v. Elliott* (*supra*), approved, and *Brown v. Storey* (1840) 1 M. & G. 117, questioned.

It seems that a bare notice by a mortgagee to a subsequent tenant of the mortgagor to pay him the rent not assented to by the tenant, will not create any new tenancy; but that a notice acquiesced in by payment of rent or otherwise is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee and the tenant in possession: *Forse v. Sovereign* (1887) 14 A. R. 482; *Doe v. Bucknell* (1838) 8 C. & P. 566; *Rogers v. Humphreys* (1835) 4 A. & E. 299; *Doe v. Barton* (1840) 11 A. & E. 307; *Hickman v. Machin* (1859) 4 H. & N. 716; 28 L. J. (Ex.) 310; *Corbett v. Plowden* (1884) 25 Ch. D. 678 [C. A.].

Where a mortgagor gave an authority to the mortgagee to receive the rent of a tenant, under a demise subsequent to the mortgage, and the mortgagee received the rent for some time; after which the authority was countermanded, and the tenant refused to pay to either, and the mortgagor distrained, it was held that the relation of landlord and tenant was not created between the tenant and the mortgagee: *Wheeler v. Branscombe* (1843) 5 Q. B. 373; *Wilton v. Dunn* (1851) 17 Q. B. 294.

A mortgagee out of possession who gives notice of the mortgage to the tenant who has become tenant since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after

the notice, the doctrine of relation not applying to such a case: *Litchfield v. Ready* (1850) 5 Exch. 939. But under the Judicature Act such a tenant is liable to the mortgagee in an action for possession and mesne profits after notice of the mortgage and a request for payment of rent: *Dunlop v. Macedo* (1891) 8 T. L. R. 43; *Tower-son v. Jackson* [1891] 2 Q. B. 484 [C. A.]. When a mortgagee gives notice to the lessee of the mortgagor, the rent will be that previously existing under a new tenancy from year to year: *Corbett v. Plowden* (1884) 25 Ch. D. 678 [C.A.]; 54 L. J. Ch. 109.

Although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him and acquiescence by the tenant by payment of rent, still where it is not intended to create such a contract but rather that the interest being paid, the possession of the mortgagor and his tenant shall remain undisturbed, effect will be given to this intention and the lessee will still hold under the mortgagor: *Forse v. Sovereign* (1887) 14 A. R. 482.

If, after the intended lessee has taken possession, the mortgagees claim rent and withdraw the mortgagor's authority to receive it, this will be an assertion of title paramount to that of the mortgagor, and on the tenant paying rent to the mortgagees he will hold, not under the terms of the agreement, but as tenant from year to year: *Corbett v. Plowden* (*supra*).

#### *In Certain Cases the Tenant may Redeem the Mortgaged Lands.*

A lessee may redeem although his lease, being made after the mortgage, is not good against the mortgagee, and although the lessor has released his equity of redemption. This right to redeem is absolute, and the Court has no discretion to grant or refuse redemption.

Where a subsequent lessee of a mortgagor sought to redeem the lands in the hands of the mortgagee who had obtained an order for foreclosure in a suit to which the lessee was not a party, it was held that he had a right to



redeem in the event of the mortgagee refusing to accept him as tenant. An offer by the mortgagee to give up possession on payment of a certain sum will not affect the right to redeem where the offer has not been accepted or acted on by him: *Martin v. Miles* (1884) 5 O. R. 404; *Collins v. Cunningham* (1892) 21 S. C. R. 139.

Where the mortgagor contracts in writing to grant a lease of the premises to a tenant and the latter enters into possession and on notice from the mortgagee pays rent to him, the tenant is entitled to redeem if the mortgagee refuses to concur in a lease to him: *Tarn v. Turner* (1888) 39 Ch. D. 456; 57 L. J. (Ch.) 1085 [C. A.].

*The Situation where the Mortgagee Alone Makes the Lease.*

A decision of Lord Macclesfield holds that a mortgagee before foreclosure cannot make a lease for years to bind the mortgagor unless to avoid an apparent loss and merely of necessity: *Hungerford v. Clay* (1722) 9 Mod. 1; and no later decision has disturbed this. That was the case of a lease for longer than the period of redemption fixed in the mortgage, and it was held that the lease was invalid against the mortgagor on redeeming.

Under the Acts respecting Short Forms of Mortgages [R. S. O. 1914 c. 117 Sched. B, s. 14], the mortgagee has the right after default in payment of principal or interest, to take possession of the mortgaged property and to make any lease thereof, to run during the currency of the mortgage, and which will not interfere with the mortgagor's right to redeem. If the security be scanty and the interest in arrear, the mortgagee may give the lessee the right to cut timber on the premises. A lease so made does not require any previous notice to the mortgagor, and where the security is sufficient the lease would be subject to the right of the mortgagor to pay up arrears of interest and resume possession even before it expired, though it is doubtful whether he could do so when the security is insufficient.

In the latter case *Hungerford v. Clay* (*supra*), seems to show that the lease would have to run until the mortgage was redeemable. Where, however, the mortgagee proceeds under the Act which expressly gives the right to lease, he does so for the purpose of destroying the equity of redemption, and notice would be required or compliance with the proviso in case it dispensed with notice: *Brethour v. Brooke* (1893) 23 O. R. 658; 21 A. R. 144; *Clark v. Harvey* (1889) 16 O. R. 159; *Barry v. Anderson* (1890) 18 A. R. 247.

The provisions of the various Land Titles Acts are discussed under Article 29.

### LEASES UNDER STATUTE.

ARTICLE 29.—In certain provinces a mortgagee who has entered into possession of mortgaged premises has a statutory right to make a valid lease of the same—even to the mortgagor.

[Authorities: R. S. O. 1914 c. 117, Sch. B. s. 14 (*supra*) *Rollefson Bros. Co. et al. v. Olson* (1915) 8 Sask. L. R. 143; 8 W. W. R. 481; 31 W. L. R. 157 [Ct. en B.]; *Nichol v. Pedlar & Johnston* [1919] 3 W. W. R. 712 [C. A.]; Land Titles Acts [Sask.] (1917) 7 Geo. V. [2 Sess.] c. 18 s. 108; [limiting the term to five years] [Alberta] (1906) 6 Edw. VII., c. 24, s. 62 (a). Manitoba, R. S. M. (1913), c. 171, s. 118; and see *Warren v. Johns* [1920], 3 W. W. R. 568 [Alberta, Scott, J.].

The Manitoba Act provides that: "If default be made in the payment of the principal sum, interest, annuity or rent charge, or any part thereof, secured by any mortgage or encumbrance registered under the new system, or if default be made in the observance of any covenant expressed in any mortgage or encumbrance or that is herein declared to be implied in such instrument, and if such default be continued for the space of one calendar month or for such longer period of time as may therein for that purpose be expressly limited, the mortgagee or encumbrancee may forthwith, after giving written notice,

a copy of which shall be filed in the land titles office, to the said mortgagor or encumbrancer, his executors, administrators or assigns, and every other person appearing at the time of filing such notice in the land titles office to have any mortgage, encumbrance or lien upon, or estate, right or interest in or to the lands subsequent to such first-named mortgage or encumbrance, of his intention in that behalf, without any further consent or concurrence upon his or their part, enter into possession of the lands and receive and take the rents, issues and profits thereof, and, whether in or out of possession thereof, may make any lease of the same or any part thereof as he may see fit, and may also in such notice require the mortgagor or encumbrancer and such other interested persons as aforesaid to pay within a time to be specified in such notice the money then due or owing on such mortgage or encumbrance, or to observe the covenants therein expressed or implied, as the case may be, and that all remedies competent will be resorted to unless such default be remedied."

The Manitoba Act also contains the following provisions:

"114. The mortgagee or encumbrancee upon default of the payment of the principal sum or interest or annuity or any part thereof respectively, at the time mentioned in the mortgage or encumbrance, may enter into possession of the mortgaged or encumbered land by receiving the rents and profits thereof, and may distrain upon the occupier or tenant of the land under the power to distrain hereinafter contained, or may bring action to recover the land either before or after entering into receipt of the rents and profits thereof or making any distress, and either before or after any sale of such land shall be effected under the power of sale aforesaid, in the same manner in which he or they might have brought such action if the money secured by the mortgage or encumbrance had been secured to him or them by an assurance of the legal estate in the land mortgaged or encumbered;

and any mortgagee or encumbrancee shall be entitled to foreclose the right of the mortgagor or any person claiming under him to redeem the mortgaged or encumbered land in manner hereinafter provided."

"115. Besides his other remedies, every first mortgagee or encumbrancee for the time being shall be entitled, as often as it shall happen that the interest or annuity secured by the mortgage or encumbrance or any part thereof respectively shall be in arrear for twenty-one days and after seven days shall have elapsed from an application to the occupier or tenant for the payment thereof, to enter upon the mortgaged or encumbered land and distrain the goods and chattels of such occupier or tenant for the arrears of the said interest or annuity, and the distress and distresses then and there found to dispose of in like manner as landlords may do in respect of distresses for rent reserved upon common demises, and out of the sale moneys to retain the moneys which shall be so in arrear and all costs and expenses occasioned by such distress and sale:

Provided that no occupier or tenant shall be liable to pay to any such mortgagee or encumbrancee a greater sum than the amount of rent which at the time of making such application for payment shall be due from any such occupier or tenant; and any amount so paid, as well as any amount which shall be paid by him to any such mortgagee or encumbrancee during the time he may be in receipt of the rents and profits, shall be held to be pro tanto satisfaction of the rent."

### *Even to the Mortgagor.*

Important questions sometimes arise as to the right of execution creditors of the mortgagor who takes a lease from the mortgagee.

The Land Titles Acts of the various provinces provide that when a mortgagee wishes to enter into possession of the mortgaged premises and take the rents and profits thereof, or desires to make any lease of the premises, he may do so after first giving written notice of his inten-

tion in that respect and filing a copy in the Land Titles Office: Sask. s. 108; Alta. s. 62 (a) Man. s. 118.

In *Rollefson v. Olson* (*supra*) the mortgagees entered (July, 1914) under a power given in their mortgage which also contained an attornment clause (see p. 245) and on the same day secured the execution by the mortgagor as tenant of a lease of the land for one year "to be computed from the first day of January, 1914." The rent reserved was one-half of the crop. On September 2, 1914, the sheriff seized "all the grain" on the land under writs of execution against the mortgagor. It was urged on behalf of the execution creditors that the mortgagees had not complied with the Act and the lease was ineffective as against them. Haultain, C. J., said (p. 484): "This objection is met at the very threshold by the fact that the mortgagor acquiesced in the possession and leasing by the mortgagee. In any event this is not an objection which concerns the present case. This is not the case of a sale as in *Smith v. National Trust* (1912) 45 S. C. R. 618; 1 W. W. R. 1122; 20 Man. L. R. 533, and the interests of none of the persons to whom notice is required to be given by the above-mentioned enactment are in the least affected by the result."

Elwood, J., did not follow the Chief Justice in his application of *Smith v. National Trust*, but arrived at the same result. He said (p. 486): "The notice is only necessary in case the assistance of the Act is being invoked by the mortgagee."

Brown, J. (dissenting), gave effect to the argument, saying (p. 485): " . . . the lease cannot, in my opinion, have any effect as against execution creditors who have seized the grain which is claimed as rent under the lease;" and applied *Smith v. National Trust* (*supra*).

In *Nichol v. Pedlar* the facts were that in 1911 H. N. registered owner, mortgaged his farm. On November 19, 1914, an execution was filed in the lands titles office against N. at the instance of B. On July 31, 1915, the defendants registered another execution against N. On December 15, 1917, N. took a lease of the said land from

C., who had entered into possession, for ten months, agreeing to pay as rent the sum of \$378.50. On July 17, 1918, during the currency of this lease, the land was sold by the sheriff under the execution of B. to K, but "subject to the mortgage of" C. The sale was duly confirmed. On September 2, K. sold and transferred the land to O. N., wife of the said H. N., and title was issued to her, subject to the said mortgage.

The crop on the land was put in by H. N. during the spring of 1918. On September 10, 1918, the sheriff seized the crop while it was still uncut, under the defendants' execution. O. N. claimed the crop, contending that it had passed with the sale of the land to K. and from K. to herself. The sheriff took interpleader proceedings and an issue was directed. On the trial of the issue the claim of O. N. was barred, it being held that C. in the full exercise of his rights had entered into possession of the land and had made a lease thereof, that the land had been sold subject to the mortgage, and, therefore, the mortgagees' right to possession by their tenant had not been interfered with, and, consequently, N.'s possession was valid as against the purchaser.

*Nichol v. Pedlar and Johnston* was decided by a Court of which Elwood, J., was one.

## ATTORNMENT CLAUSES.

ARTICLE 30.—A bona fide attornment clause in a first mortgage of land under the old system which conveys the fee simple to the mortgagee creates the relationship of landlord and tenant between the mortgagee and mortgagor respectively with a right of distress as extensive as in other cases of tenancy—including the right, subject to statutory restriction [see Article 72], to distrain the goods of a stranger—and this whether the mortgage deed is executed by the mortgagee or not—provided the rent

reserved bears a fair reasonable proportion to the annual value of the land.

[Authorities: *Morton v. Woods* (1869) L. R. 4 Q. B. 293; *In re Stockton* (1878) 10 Ch. D. 335; *Yates v. Ratledge* (1859) 5 H. & N. 248; *Cox v. Leigh* (1873) L. R. 9 Q. B. 333; 43 L. J. (Q. B.) 123; *In re Threlfall* (1880) 16 Ch. D. 274; 18 Hals. 336; *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S. C. R. 482 [S. C. Can.—Ont.]; *Linstead v. Hamilton, etc., Co.* (1896) 11 M. R. 199; *Hyde v. Chapin* (1916) 9 W. W. R. 1142; 33 W. L. R. 559 (Alta. App. Div.); *McDermott v. Fraser* (1915) 25 M. R. 298 [Curran, J.]; *First National Bank v. Cudmore* [1917] 2 W. W. R. 479 [Sask. Ct. en B.]; *Sturgeon v. Henderson* [1917] 3 W. W. R. 56 [Man.—Mathers, C.J.K.B.].

The terms “Old System” and “New System” are used in contra-distinction by Duff, J., in *Smith v. National Trust*, discussed at length at p. 250, *post*, and in the Manitoba Real Property Act, R. S. M. (1913), c. 171, s. 2 (*s*) and (*t*); the “New System”—is the Torrens System.

Second and subsequent mortgages under the Old System are dealt with in Article 31 and mortgages under the New System in Article 32. This article deals only with first mortgages under the Old System.

### *The Origin of the Attornment Clause.*

Mortgages contained—and still contain—as a general rule a license to distrain (see p. 234, *post*) which created no tenancy but was merely a license between mortgagor and mortgagee: *Trust and Loan Co. v. Lawrason* (1882) 6 A. R. 286; *Re Willis* (1888) 21 Q. B. D. 395.

Gwynne, J., said in *Trust and Loan Co. v. Lawrason* (1881) 10 S. C. R. 679, “At the time of the passing of the 27 and 28 Vic. c. 31 (Short Forms Act), it was the universal practice, I may say, in the Province of Upper Canada for mortgagees to insist, as a condition of all loans on mortgage, upon a clause being inserted in the mortgage whereby in express terms the mortgagor

became tenant to the mortgagee at a rent which was the interest agreed upon for the principal sum secured by the mortgage, and the object of the Act was simply, in my opinion, as its title indicates, to establish a short form, which could conveniently and at trifling expense be registered in full. That the relation of landlord and tenant can subsist between a mortgagee and his mortgagor simultaneously with, and by virtue of the same instrument as creates the relationship of mortgagee and mortgagor, is not disputed. If, then, the language of the short form given by the statute is sufficient to create the relationship of landlord and tenant at a rent, I cannot see upon what principle we should construe that language as conferring a mere license to distrain the goods of the mortgagor himself alone, and so deprive the mortgagee of the security which (upon the faith of the language of the statute being sufficient for the purpose), may have been an essential condition without which he would not have consented to lend his money; and I cannot see how a mortgagee's insisting upon his having the security, which a mortgagor becoming tenant of the mortgagee for the mortgaged premises gives to the latter, can be regarded as in fraud of the Chattel Mortgage Act."

The attornment clause usually reads somewhat as follows:—"The mortgagee leases to the mortgagor the said lands from the date hereof until such date as the principal money hereby secured becomes due according to the terms hereinbefore mentioned, the mortgagor paying in every year during the said term, on the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso. And it is agreed that such payments when so made shall respectively be taken, and be, in all respects, in satisfaction of the moneys so then payable according to the said proviso. And the mortgagor doth attorn and become a tenant from year to year to the mortgagee from the day of the execution hereof at a (half) yearly (and on default in payment of interest,



daily) rental, equivalent to, applicable in satisfaction of, and payable at the same time as the interest upon the principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the mortgagee and mortgagor; but it is agreed that neither the existence of this clause nor anything done by virtue hereof shall render the mortgagee a mortgagee in possession, or accountable for any moneys except those actually received."

The intention, of course, is to create the relationship of landlord and tenant between the mortgagee and mortgagor respectively and so give to the mortgagee the summary remedies of a landlord.

It should be borne in mind that "the essence of a legal mortgage is the vesting of the legal estate in the mortgagee, together with the right of possession": Fisher on Mortgages, and McNeill, D.C.J., said, in *Hyde v. Chapin & Co.* (1915) 8 W. W. R. 820 (Alta.) at p. 821: "The relation of landlord and tenant does not arise from the fact that the mortgagor has executed a mortgage . . . but because of a lease, which, while it could in this particular case have been verbal is in this instance evidenced by the attornment clause . . . nor in my opinion should it be any less a lease or confer any lessened incidental rights and remedies on the landlord because it was entered into co-incidental with the execution of a mortgage . . . or because the written evidence of its existence is contained in such a mortgage . . ."

The English decisions have been followed in the Canadian Courts when mortgages which vest the legal estate in the mortgagee have been under consideration. In *Thomas v. Cameron* (1885) 8 O. R. 441, the principles laid down in the English decisions were held to apply in Ontario, and in *Hall v. Welman* (1913) 5 W. W. R. 6 (Alta.) Beck, J., followed *Thomas v. Cameron* and held they were applicable in Alberta in considering an attornment clause in an agreement for sale. But see Article 32, dealing with attornment clauses in mortgages under the Torrens System.

*The Attornment Clause must not be a Mere Sham.*

It is established "beyond question that a clause in a contract creating the relation of landlord and tenant between the parties thereto, if *bona fide*, is a perfectly valid clause, and one to which effect will be given by the Courts. The whole question is, did the parties when they executed the document have a real honest intention of creating the relationship of landlord and tenant, or was it their intention under the guise of such relationship to effect some other purpose?" Per Lamont, J., in *Independent Lumber Co. v. David et al.* (1911) 1 W. W. R. 134; 19 W. L. R. 387; (Sask.) at p. 141, citing the remarks of Brett, L.J., in *Ex parte Voisey* (1882) 21 Ch. D. 442, and referring to *Ex parte Williams* (1877-8) 7 Ch. D. 138; *Ex parte Jackson* (1880) 14 Ch. D. 725 and *Hobbs v. Ontario Loan and Debenture Co.* (1880-1) 18 S. C. R. 433: see per Gwynne, J., at p. 530, "The question is one of fact depending upon the circumstances of each case."

Where the attornment clause in a mortgage is a mere sham, and the rent reserved is so excessive as to afford evidence that it was not intended to create a real rent or real tenancy, but was merely an additional security by way of distress, it will be invalid: *Ex parte Jackson, In re Bowes* (1880) 14 Ch. D. 725; 43 L. T. 272 [C.A.]; *Stikeman v. Fummerton* (1911) 21 M. R. 754: 16 W. L. R. 502 [Macdonald, J.].

In *McDermott v. Fraser* (1915) 25 M. R. 298; 8 W. W. R. 196; and *Sturgeon v. Henderson* [1917] 3 W. W. R. 56; 37 D. L. R. 54 (Man.), the mortgages considered were "Old System" mortgages, that is those passing the fee. In the *McDermott Case* the mortgage was a second mortgage made pursuant to the Short Forms of Indenture Act and contained these clauses:—

"And for the purpose of better securing the punctual payment of the interest on the said principal sum the mortgagor doth hereby attorn tenant to the mortgagee for the said lands at a yearly rental equivalent to the annual interest secured hereby to be paid yearly on each 1st day of December, the legal relation of landlord and

tenant being hereby constituted between the mortgagee and mortgagor."

It also contained the statutory proviso found in the Short Forms Act, permitting the mortgagee to distrain for arrears of interest [as to which see p. 234, *post*], and in addition the clause following relating to principal:—

"And further, that if default should be made in payment of any part of the said principal at any day or time hereinbefore limited for the payment thereof, it shall and may be lawful for the mortgagee and the mortgagor doth hereby grant full power and license to the mortgagee to enter, seize and distrain upon any goods upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of such principal as shall from time to time be or remain in arrear or unpaid together with all costs, charges and expenses attending such levy or distress as in the case of distress for rent."

Curran, J., held that the relation of landlord and tenant was created by the attornment clause—that the yearly rent so reserved—\$605, was considerably less than the fair rental value of the premises—\$720—and the amount of interest due, \$570.20, was legally distrainable for as rent reserved, upon the goods and chattels found upon the demised premises subject to the restrictions imposed by the Distress Act: *Linstead v. Hamilton Provident and Loan Society* (1896-7) 11 M. R. 199, followed.

In *Sturgeon v. Henderson* (*supra*), the annual interest of \$560 was held by Mathers, C.J.K.B., not to be an excessive rent for a section of land (640 acres).

In this case the mortgage contained an attornment clause similar to that in *McDermott v. Fraser* and the usual clause empowering the mortgagee to distrain for arrears of interest. See p. 234, *post*.

In England the Bills of Sale Acts, 1878 and 1882, bring the attornment clause within the provisions of the Bills of Sale Act and mortgages having such clauses require registration under that Act. See 21 Hals. s. 303;

18 Hals. p. 336; 3 Hals, pp. 15 and 24. There are no similar statutory provisions in Canada.

### *The Form of the Clause.*

The form frequently varies from the form given at p. 228, *ante*.

An objection that the attornment clause was inoperative because it fixed no date for the payment of the rent reserved was disregarded by Mathers, C.J.K.B., where the clause, read without regard to the blanks, provided for a yearly rental equivalent to the annual interest, payment of which was provided for by the other provisions in the mortgage: *Sturgeon v. Henderson*, *supra*, p. 230.

### *The Mortgage Need not be Executed by the Mortgagee.*

It is not necessary to the validity of an attornment clause that the mortgage deed should be executed by the mortgagee: *Morton v. Woods* (*ante*).

If executed by the mortgagor, who is tenant in possession, and delivered by him to the mortgagee, who is legal owner, it is evidence of a tenancy; and where such a clause provided that if the mortgagor should be in arrear in his monthly payments on the security, he was to become tenant from month to month to the mortgagees, and power was given to the latter to determine the tenancy on 14 days' notice, it was held that the attornment was evidence of a tenancy from month to month and not at will: *Ex parte Voisey* (1882) 21 Ch. D. 442; 52 L. J. (Ch.) 121 [C. A.].

### *There Must be a Fixed Rent.*

In *Pegg v. I. O. F.* (1901) 1 O. L. R. 97 (Div. Ct.), Boyd, C., speaking of the attornment clause, said, at p. 101: "It contains no repugnancy or inconsistency, as was argued on the authority of *Trust and Loan Co. v. Lawra-son* (1882) 10 S. C. R. 679. First of all, the essential distinction between that case and this consists in the provision herein made for paying a *fixed rent*, i.e., the rent

was to be the amount of the interest and payable half-yearly. The judicial divarication in the *Lawrason Case* arose because the attornment clause in that mortgage did not in terms refer to the interest as rent: see *Ex p. Isherwood* (1882) 22 Ch. D. 3848, 392, decided the same year. . . ."

*The Right of Distress quâ Landlord..*

Granted that a *bona fide* tenancy is created, the landlord (mortgagee) upon the tenant's (mortgagor's) default is entitled [subject to the restrictions imposed by Statute, which are dealt with at p. 458, *post*], to distrain upon any goods and chattels found on the premises including the goods of a stranger: *Kearsley v. Phillips* (1883) 11 Q. B. D. 621; 52 L. J. Q. B. 581 (C. A.); *McDonnell v. Building and Loan Ass'n* (1886) 10 O. R. 586; *Linstead v. Hamilton Provident and Loan Society* (1896) 11 M. R. 199; *McDermott v. Fraser* (1915) 25 M. R. 298; 8 W. W. R. 196 *First National Bank v. Cudmore* [1917] 2 W. W. R. 479 (Sask.).

*The Statute of Anne.*

Where there is an attornment clause in a mortgage passing the fee the Statute 8 Anne, c. 14, s. 1 [as to which see Article 83 at p. 514, *post*] applies and the mortgagee is protected *quâ* landlord: *Yates v. Ratledge* (1865) 5 H. N. 249; 29 L. J. Ex. 117, and *Cox v. Leigh*, L. R. 9 Q. B. 333, approved in *Hyde v. Chapin* (1916) 9 W. R. R. 1142; *Hobbs v. Ontario Loan and D. Co.* (1890-91) 18 S. C. R. 483 (1889) 16 A. R. 255; 16 O. R. 440; *McKay v. Grant* (1893) 4 W. L. T. 164; *First National Bank v. Cudmore* [1917] 2 W. W. R. 479.

A mortgagee, between whom and the mortgagor the relation of landlord and tenant exists by virtue of a clause in the mortgage must, under the 8 Anne, c. 14, ss. 6 and 7, [see p. 373, *post*], exercise his right of distress within six months after the end of the term: *Klinck v. Ontario I. L. & I. Co.* (1889) 16 O. R. 562.

In *Stikeman v. Fummerton* (1911) 21 M. R. 754; 16 W. L. R. 502. Macdonald, J., held that as there was not

a *bona fide* tenancy and the rent was excessive the mortgagee was not entitled to the benefit of 8 Anne, c. 14, s. 1.

*Termination of Tenancy—Notice to Quit.*

Where a tenancy from year to year is created between the mortgagor and mortgagee, it should be remembered that a half year's notice to quit is required, unless there be some provision in the mortgage to the contrary. And when a tenancy for the full term of the mortgage is created some provision should be made for its *cesser* on default.

Where a tenancy at will is created between mortgagor and mortgagee by an attornment clause in a mortgage, as the death of the tenant ends such tenancy, on the death of the mortgagor, though the heir continue in possession and pay interest, the mortgagee cannot distrain on him unless a new tenancy be created by a new attornment: *Scobie v. Collins* [1895] 1 Q. B. 375; 64 L. J. (Q. B.) 10; *Turner v. Barnes* (1862) 2 B. & S. 435.

See *Gordon v. Fraser* (1918) 43 O. L. R. 31 (Middleton, J.), where a mortgagor attempted (unsuccessfully) to claim fixtures as "tenant's fixtures" as against his mortgagee by virtue of an attornment clause in the mortgage.

*The License to Distrain for Arrears of Interest.*

The mere license to distrain for arrears of interest referred to at p. 227, *ante*, and contained in all mortgages made under the Short Forms Act of British Columbia, R. S. B. C. (1911) c. 167, Sch. (2) s. 14; Manitoba, R. S. M. (1913) c. 181, Sch. 2 (14) and Ontario, R. S. O. (1914) c. 126 (Sch.) s. 15, reads as follows:—

• "Provided that the mortgagee may distrain for arrears of interest," which is to be construed as meaning "and it is further covenanted, declared and agreed by and between the parties to these presents that, if the said mortgagor, his heirs, executors or administrators shall make default in payment of any part of the said interest, at any of the days or times hereinbefore limited for the

payment thereof, it shall and may be lawful for the said mortgagee, his heirs and assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises, so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent." It has been held that this provision is simply collateral and gives no right to take the goods of third persons.

*The Statutory Provisions.*

*(Ontario).*

The Mortgages Act, R. S. O. 1914 c. 112, s. 13, provides that "the right of a mortgagee to distrain for interest in arrear upon a mortgage [made after the 25th day of March, 1886], shall be limited to the goods and chattels of the mortgagor, and to such of them as are not exempt from seizure under execution."

Section 14 (1) provides that "as against creditors of a mortgagor or person in possession of mortgaged premises under a mortgage, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent."

(2) This restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for the general benefit of such creditors appointed before lawful sale of the goods and chattels distrained, nor unless the officer executing such writ of execution or such assignee shall by notice in writing to be given to the person distraining or his attorney, bailiff or agent before such lawful sale, claim the benefit of such restriction.

(3) When such notice is given the distrainor shall relinquish to the officer or assignee the goods and chattels so distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods and chattels distrained as shall be necessary to satisfy one year's arrears of such interest or rent and the reasonable costs of distress and sale and shall thereupon relinquish any residue of them, and pay any residue in money, proceeds thereof so distrained, to such officer or assignee.

(4) An officer executing an execution, or an assignee who pays any money to receive goods and chattels from distress under this section shall be entitled to reimburse himself therefor out of the proceeds of the sale thereof.

(5) The goods and chattels distrained shall not be sold except after such public notice as is now required to be given by a landlord who sells goods and chattels distrained for rent.

(*Manitoba*).

R. S. M. 1913 c. 55, [The Distress Act] s. 2, is similar in effect to section 13 of the Ontario Act.

(*Alberta*).

C. O. c. 34, s. 5, provides:

"The right of a mortgagee of land or his assigns to distrain for interest in arrear or principal due upon a mortgage shall, notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns and as to such goods and chattels to such only as are not exempt from seizure under execution," and a notice of sale is required by sec. 6.

In *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 A. R. 347 (C. A.), it was held—Burton, J.A., dissenting on that point—that section 13 limited the right of distress "which the mortgagees might otherwise have had under another clause in the mortgage by which the



mortgagors 'attorn to and become tenants at will to the mortgagees' at a rent equal in amount to the interest reserved payable at the time mentioned in the proviso," per Osler, J.A., at p. 358. It should be noted that the distress complained of in this case was made by the mortgagees as such and not as landlords. Burton, J.A., held that section 14 controlled the operation of section 13, but the rest of the Court, see particularly per Osler, J.A., at p. 359, refused to adopt this construction.

In Manitoba, however, section 2 has received the contrary construction, the Court en Banc holding, [*Linstead v. Hamilton Provident Loan Society* (1896) 11 M. R. 119], that the section had no reference to the right of mortgagees to distrain for rent under a tenancy validly created. This decision, which it is submitted embodies the correct view, was followed by Curran, J., in *McDermott v. Fraser*, ante.

Beck, J., said in *Hall v. Welman* (1913) 5 W. W. R. 6 (Alta.) at p. 7:—

"I think this latter provision cannot be held applicable to the case of an agreement for sale and purchase; that a vendor is not a mortgagee. I may say, however, that owing to the obviously intentional difference in the wording of this provision and the wording of the somewhat similar provisions in the Ontario Act (1886) 49 Vic. c. 29, and the Manitoba Act, R. S. M. (1892) ch. 49, such cases as *Linstead v. Hamilton P. & L. Society*, 11 Man. L. R. 199, are, perhaps, not applicable in the interpretation of the Alberta statutory provisions."

The provisions of c. 34, s. 5 (Alta.), and R.S.S. 1909, c. 51, s. 5 (Sask.) now (1919) 9 Geo. V. c. 25, s. 7, are similar.

In *Re Chalmers v. Freedman* (1909) 18 M. R. 523; 10 W. L. R. 434, the mortgage contained an attornment clause and one permitting distress for arrears of interest. Macdonald, J., said, at p. 524 (435): "The object of the attornment clause was, no doubt, to entitle the mortgagee to an additional remedy by distress, but this does not entitle him to distrain upon goods other than

those of the mortgagor: The Distress Act, R.S.M. 1902 c. 49.”

*License to Distrain for Principal Money.*

The same rules have been held to apply to a license to distrain for principal money: *Edmonds v. Hamilton Provident & Loan Society* (1890-1) 18 A. R. 347; *McDermott v. Fraser* (1915) 25 M. R. 298, following *Miller v. Imperial Loan Co.* (1896-7) 11 M. R. 247.

*Attornment Clauses in Agreements for Sale of Land.*

It is also customary in Western Canada where sales of land, not for cash, are usually made by way of agreement for sale instead of by way of deed and mortgage for conveyancers to include attornment clauses in agreements for sale of land.

*Independent Lumber Co. v. David* (1911) 1 W. W. R. 134; 19 W. L. R. 387 (Sask.), was the first case in which an attornment clause in an agreement for sale was considered and the Saskatchewan Court en Banc decided that “there is no difference in principle between the creation of the relationship of landlord and tenant under an attornment clause in a mortgage and under an agreement for the sale of land and . . . the principles stated in mortgage cases apply. . . .” Per Lamont, J., p. 139.

This view of the law is approved by Beck, J., in *Hall v. Welman* (1913) 5 W. W. R. 6; 25 W. L. R. 222 (Alta.).

In *Independent Lumber Co. v. David* the agreement contained these clauses:

“(a) And it is further agreed between the parties hereto that until the completion of the purchase the purchaser shall hold the said premises as tenant to the vendor from the day of the execution hereof at a yearly rental equivalent to, applicable in satisfaction of, and payable at the same time as, the instalments of principal and interest upon the principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser.

“(b) And the said party of the second part (purchaser) hereby attorns and becomes tenant of and to the said party of the first part (at a yearly tenancy equal to the amount of the yearly payment of interest) due upon the purchase money hereof, provided that the party of the first part may distrain for arrears of purchase money and interest.”

The Court held that although the words in clause (b) printed in brackets literally taken meant nothing as “a tenancy is the estate of the tenant in the land and cannot be equal to the annual interest”—in clause (a) they had “given a clear and unequivocal expression of their intention” and in clause (b) whatever might have been their intention they had not used language which literally expressed anything inconsistent with clause (a). In the result the agreement was held clearly to intimate that the relation of landlord and tenant should be constituted and that the purchaser should hold the land at a rental equal to the instalments of principal and interest set out in the agreement to be paid each year.

The same principles that apply to attornment clauses in mortgages as distinguished from charges [p. 227, *ante*] apply, therefore, to those in agreements; the tenancy must be *bona fide* as evidenced by a fair rent and the other features of a tenancy must appear.

In *Independent Lumber Co. v. David, supra*, the Court found the following facts tending to establish *bona fides*:—(1) The express and unequivocal declaration of the parties in their agreement that the relationship of landlord and tenant was to be constituted.

(2) The probability that such was their real intention arising from the fact that it was of the utmost importance to the vendor that it should be established.

(3) The conduct of the parties since which was wholly consistent with an intention to create that relationship.

(4) The rent reserved, \$1,537.21 a year, the fair rental value of the land being \$900, was not so grossly excessive as to justify the Court in inferring the absence of *bona fides*.

In *Hall v. Welman* (1913) 5 W. W. R. 6; 25 W. L. R. 222 (Alta.), the agreement for sale contained this clause: "The party of the second part (purchaser) attorns to and becomes the tenant of the party of the first part (vendor) of the said lands and premises and the party of the first part shall be at liberty to distrain for all arrears whether of principal or interest." The vendor distrained upon the goods of the purchaser's husband which were upon the premises. Beck, J., quoted with approval the words used by Lamont, J., in *Independent Lumber Co. v. David* [printed at p. 230, *ante*] and adopting the opinion expressed by the late A. H. Marsh, K.C., in VI. *Canadian Law Times*, pp. 217, 265 and 313, held that the attempt to create the relation of landlord and tenant was ineffectual. He said, at p. 8: "I think decisions of this class (in reality) are based upon the ground that a fictitious tenancy, inasmuch as it is calculated to work injustice to third parties, is, to that extent at least, void as being against public policy or more accurately speaking, the policy of law. If a clause creating a fictitious tenancy were valid it would result in the goods on the premises or (fraudulently removed) of strangers being subject to seizure, now limited, however, by the Ordinance which I have quoted," [namely: An Ordinance respecting distress for rent and extra-judicial seizure, C. O. 1898 c. 34, s. 5] . . . "it would give a preference to the landlord over the creditors not only of the tenant but of such third parties as are not protected by the Ordinance and in that regard would be opposed to the policy not only of the Assignments Act ch. 6 of 1907, but also the Creditors' Relief Ordinance, c. 4 of 1910, Second Session and of the Ordinance . . . already quoted."

He also held that the provisions of s. 5 of the Ordinance Respecting Distress (p. 236, *ante*) could not be "held applicable to the case of an agreement for sale and purchase, that a vendor is not a mortgagee"; also that, "owing to the obviously intentional difference in the wording of this provision and the wording of the somewhat similar provisions in the Ontario Act (p. 235, *ante*)

and the Manitoba Act (p. 236, *ante*) such cases as *Linstead v. Hamilton P. & L. Society* (1896) 11 M. R. 199, were, perhaps, not applicable in the interpretation of the Alberta Statutory provisions.”

The motion for judgment was adjourned for ten days to allow the vendor to endeavor by oral evidence—*e.g.*, of the value and rental value of the property—to satisfy the Court that the so called rent was reasonable and the alleged tenancy not a fictitious one.

In *Jamieson v. Moore* (1920) 50 D. L. R. 775 [1920] [Man.—C. A.], Perdue, C.J.M., said:—

“The plaintiff in the present case is the vendor, and the defendant is the purchaser of certain land and the latter is a person entitled to the protection afforded by the War Relief Act, 1918. In the agreement under seal which was executed by the parties and which contains the terms of the agreement it is declared that the purchaser (the defendant) shall hold the said land and premises as tenant to the vendor (the plaintiff) from the day of execution hereof at a yearly rental equivalent to, applicable in satisfaction of and payable at the same times as the instalments of principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser. As between the parties to the instrument this covenant is good, there being no collusion between the parties to interfere with the rights of third parties. In *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 Can. S. C. R. 483, it was held by Strong, Fournier, Gwynne and Patterson, JJ., Ritchie, C.J., and Taschereau, J., dissenting, that a clause in a mortgage similar in effect to the above and purporting to create the relationship of landlord and tenant between the mortgagee and mortgagor failed to give to the mortgagee a right to distrain for arrears of rent *as against the execution creditors of the mortgagor*. In that case the mortgagee had not signed the mortgage. It was, however, conceded by the Judges forming the majority of the Court that the relationship

of landlord and tenant might be created as between the parties to the mortgage if the deed were executed by both mortgagee and mortgagor. Strong, J., said at 507-508:—‘The mortgagor himself would be considered as having incapacitated himself from asserting the invalidity of what he had deliberately affirmed to be true relation between himself and the mortgagee in an instrument under seal, but as regards third parties interested in so doing I know of no reason why it should be confined to any particular class such as assignees in bankruptcy.’ Patterson, J., said at 522:—‘A mortgagor is at perfect liberty to agree that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, without any regard to the value of the land, and whether the goods are on the mortgaged premises or elsewhere.’ Ritchie, C.J., with whom Taschereau, J., agreed, held that the execution of the mortgage and the continuance in possession by the mortgagee constitutes the relation of landlord and tenant and that there was nothing to prevent the parties from making such a contract. In *Linstead v. Hamilton Provident & Loan Society* (1896) 11 Man. L. R. 199, it was held by Killam, J., that a special attornment clause whereby the mortgagor became tenant to the mortgagee, but which had not been executed by the latter, validly created the relationship of landlord and tenant between the parties. This case was followed by Curran, J., in *McDermott v. Fraser* (1915) 23 D. L. R. 430; 26 Man. L. R. 298. Section 10 of the War Relief Act, 1918, was not intended to confer upon a mortgagee or a vendor any other or greater rights or remedies than those which he possessed under the mortgage or the agreement. It would be strange indeed if in an Act specially intended to protect from his creditors a man engaged in performing military service for His Majesty, there should be contained a new and drastic form of remedy which did not exist in respect of the original contract. The right here sought to be enforced was created by the agreement executed by the parties. I think that the relationship of landlord and tenant

had been validly created between the plaintiff and defendant, and that section 10 permitted the plaintiff as landlord to pursue his remedy against the defendant, as tenant, by a suit in the Court of King's Bench, to recover the rent due to the plaintiff under the terms of the agreement, to the extent allowed by that section. In this view the plaintiff would be entitled to recover to the extent of the interest, taxes, insurance and any other moneys paid by the plaintiff in respect of charges payable by defendant; but as no cross-appeal was brought by the plaintiff the judgment entered by the trial Judge will have to stand. That judgment should be considered as a recovery *pro tanto* only, and should be without prejudice to the plaintiff's right to sue for the remainder of his claim."

*Attornment Clauses in Crop Payment Agreements for Sale of Land.*

In *Dornian v. Crapper* (1914) 6 W. W. R. 551 (Sask.—Brown, J.), it appeared that an agreement for the sale of land provided that the purchase price was to be paid so much in cash and the balance by crop payments. The agreement contained the usual acceleration and attornment clauses. In an action for breach of contract Brown, J., said, at p. 553: "Counsel for the (Vendor) stated . . . and in my judgment it was quite proper that he should do so . . . that the (Vendor) would not rely upon the acceleration clause . . . The contract contains the customary attornment clause in which it is provided that the amount of rent payable shall be the equivalent of the instalment of principal and interest falling due each year,—in this case one-half of the crop. This is a valid attornment clause and the amount of rent would not be unreasonable; in fact, during the year 1913, it would be very little more than enough to pay the interest: See *Foster v. Moss* (1911) 17 W. L. R. 174; *Independent Lumber Co. v. David* (1911) 1 W. W. R. 134; 19 W. L. R. 387."

The breach by the purchaser of the provisions of a crop payment agreement was held to justify action by

the vendor under the attornment clause in the agreement and under a chattel mortgage given to the vendor by way of collateral security. He seized under the attornment clause and under the chattel mortgage but abandoned his seizure under the attornment clause. The seizure was held to be unreasonable and oppressive—the purchaser was given damages in the actual value of the goods sold after the vendor's claim had been satisfied. The vendor was only given certain of the costs of the seizure and no fees were allowed for the appraisement in view of the fact that the bailiff who made the seizure was one of the appraisers, reference to 11 Halsbury p. 171, *Independent Lumber Co. v. David* (1911) 1 W. W. R. 34; *Dornian v. Crapper*, ante.

#### ATTORNMENT IN SECOND MORTGAGE.

ARTICLE 31.—The attornment clause in a second or subsequent mortgage under the old system creates the relationship of landlord and tenant (although the mortgagor has already attorned tenant to the first mortgagee of the same property and the second mortgage shews on its face that the first is unpaid); but as it operates by way of estoppel or quasi-estoppel only, the landlord has not the right to distrain the goods of strangers nor does the Statute of Anne apply in his favour.

[Authorities: *Morton v. Woods* (1869) L. R. 3 Q. B. 658; *Ex parte Punnett In re Kitchen* (1880) 16 Ch. D. 226; 50 L. J. Ch. 212; *First National Bank v. Cudmore*, [1917], 2 W. W. R. 479 [Sask., Ct. en Banc]; *McDermott v. Fraser* (1915) 25 M. R. 298 (Curran, J.)]

As the relationship is created by estoppel only it would seem that the parties are in the same position as mortgagor and mortgagee under a new system mortgage. See the following article.



## ATTORNMEN IN NEW SYSTEM MORTGAGE.

ARTICLE 32.—An attornment clause in a mortgage under the New System by which a mortgage is merely a charge or security which does not transfer the property with a condition for re-conveyance, but only gives a right to payment out of the property and entitles the holder to have the property comprised therein sold to raise the money charged thereon and where the fee simple remains in the registered owner, can create no real tenancy with all that that implies with respect to third parties, although as between the parties themselves their position is governed by their contract.

[Authorities: *Hyde v. Chapin* (*infra*); *First National Bank v. Cudmore* [1917] 2 W. W. R. 479, Sask. L. R. [Ct. en B.]; and see *In re Crossen Metal Works, Ltd.* [1920], 3 W. W. R. 197: 54 D. L. R. 341 [Man. C. A.].

There is a class of "mortgages" to which considerations entirely different to those dealt with under Article 30 are applicable, namely: "mortgages" or more properly "charges" made under the Torrens [or New] System—the only system in force in Alberta and Saskatchewan and which exists side by side with the "old system" so called, in Manitoba and Ontario. By the Torrens System, mortgages have effect as security but do not operate as transfers of the land charged or of any estate or interest therein: See the Land Titles Act of Alberta (1906) c. 24, s. 61; the Real Property Act of Manitoba, R. S. M. (1913) c. 171, s. 108; the Land Titles Act Ontario, R. S. O. (1914) c. 126, s. 30 (3); Land Titles Act Saskatchewan, (1917) 2 Sess. c. 18, s. 102.

The tendency to apply to mortgages under the Torrens or "new" systems principles properly applicable only to mortgages under the old system has led in recent years to some confusion. As Stuart, J., says, in *Hyde v. Chapin* (1916) 9 W. W. R. 1142 (Alta.) 33 W. L. R. 559,

at p. 1144, "We are, it seems, face to face with one of the difficult problems which inevitably arise from the necessity, or supposed necessity, of attempting to engraft upon our system of Land Titles principles of the English Law, statutory and otherwise, which were developed and worked out under a different system altogether. There is no question which has so profoundly affected English decisions (I do not mean merely upon the particular point involved in this case, although in *Yates v. Ratledge* (1860) 5 H. & N. 248, the reference to the matter is very pointed) as the question, who has the legal estate in fee simple?"

The question in this case was whether an attornment clause in a mortgage under the Alberta Torrens System created a real tenancy in the mortgagor so as to give the mortgagee the benefit of the Statute 8 Anne c. 14, s. 1. [see Article 83, p. 514, *post.*] Stuart, J., delivering the judgment of the Appellate Division said in 9 W. W. R. p. 1145: "Is it possible to say that the legal relation of a tenant to a landlord was really created by the clause as in question so as to bring about the operation of the Statute of Anne? In an English mortgage the fee is conveyed and of course the holder of the fee can take the grantor as his tenant if they both so agree. And even to a second mortgagee the mortgagor may attorn and become tenant because he has no legal estate in the land at all but only an equivalent right to redeem. But where he is the owner of the fee simple himself how can he be a tenant to the person to whom he has given a mere statutory charge? It may be true that the mortgagee has an equitable interest or a statutory charge which he can deal with and alienate but certainly, if he can grant a lease of it, and assuming that he can, that would be a different thing from a lease of the land itself upon which his charge (which is his equitable estate) rests."

"For these reasons I think the attornment clause in our forms of mortgages cannot create any real tenancy in the mortgagor, no matter what the parties say, so as to bring in the Statute of Anne. No doubt it is valid, as creating merely contractual rights, between the par-

ties, and the mortgagee by virtue of the license given him may distrain if there is no legal impediment in his way. But the seizure by the sheriff puts the goods *in custodia legis* and the Statute of Anne does not help the mortgagee."

"This view is the basis of the decision in *Jellicoe v. Wellington Loan Company* (1886) 4 N. Z. L. R. 330, a case under a similar statute of Land Titles.

"With much respect, I do not see the application of the rule that a tenant cannot deny his landlord's title. That rule applies where there has been in very fact a demise or an attornment. But even then where the tenancy is alleged to have arisen in the first place by estoppel then the tenant is not estopped from denying title in the person claiming to be his landlord. See *Foa*, 5th Ed. p. 462. Nor do estoppels hold as against third parties."

In *First National Bank v. Cudmore* [1917] 2 W. W. R. 479 (Sask.) Haultain, C.J., delivering the judgment of the Court en Banc on the question, said at p. 480: "On this point I agree with the decision of the Alberta Court in *Hyde v. Chapin* (1916) 9 W. W. R. 1142; 33 W. L. R. 559, that an attornment clause in a 'mortgage' under the Land Titles Act, though it may create contractual rights between the parties to it, does not create the relation of landlord and tenant so as to give the mortgagee the protection of the Statute of 8 Anne, ch. 14, s. 1. The same view was held by the New Zealand Court in *Jellicoe v. Wellington Loan Company* (1886) 4 N. Z. L. R. 330. See also *Tadman v. Henman* [1893] 2 Q. B. 168."

*Hyde v. Chapin* has also been followed in *Great West Saddlery v. Griesbach et ux.* (1915) 9 W. W. R. 528 [Alta.] by Winter, D.C.J., and in *Traders Bank v. Rutherford* (1906) 10 W. W. R. 796 (Sask.) by McLorg, L.M.

The effect of the decisions in *Hyde v. Chapin* and *First National Bank v. Cudmore* is that no real tenancy is created in the mortgagor by an attornment clause, although it is valid as creating merely contractual rights between the parties.

This rule would apply with equal force to mortgages under the Torrens System in any province which has not the statutory provisions hereinafter referred to. It is not affected by the decision of the Saskatchewan Court en Banc in *Rollefson Bros. Co. v. Olson* (1915) 8 W. W. R. 481. In that case the mortgage contained an attornment clause and also a provision that upon default the mortgagee might enter into possession and lease the mortgaged lands. Default was made and the mortgagee entered into possession and on the same day secured the execution by the mortgagor as tenant of a lease of the land—the rent reserved being one-half share of the crop. The lease was not signed by the mortgagee. Subsequently the sheriff seized all the grain on the land under execution against the mortgagor. The Saskatchewan Court en Banc, held, Brown, J., dissenting, that the mortgagee's claim to one-half of the crop and a further amount to represent all taxes should be sustained as against the execution creditors.

Haultain, C.J., said, at p. 482: "There can be no question that the main object of the lease was to secure possession of part of the crop. That does not seem to me to in any way impugn the *bona fides* of the transaction. See *Ex parte Voisey*, cited below." See also the remarks of McLorg, L.M., in *Traders Bank v. Rutherford* with reference to this case, (1916) 10 W. W. R. 796 (Sask.).

In *Fawell v. Andrew* [1917] 2 W. W. R. (Sask.) 400, a mortgage containing an attornment clause and an acceleration clause was executed by the defendant who subsequently made default. The plaintiff (the mortgagee) commenced action under the acceleration clause and the defendant entered an appearance. Subsequently the plaintiff distrained under the attornment clause for the full amount in arrears and seized a large quantity of grain. The defendant anticipated that the grain seized would satisfy the arrears under the mortgage and did not enter a defence. The plaintiff signed judgment in default, issued writs of execution against goods and lands and entered into possession of the lands, giving a lease of the same for a term of three years. The defendant

applied to have the writs of execution and the order *nisi* set aside. Brown, J., who delivered the judgment of the Court en Banc said, at p. 402: "The right of a mortgagee to pursue all his remedies contemporaneously, I take it means all the remedies which the mortgagee ordinarily has as incident to a mortgage, including the right to an action on the covenant, the right of possession and the right of sale or foreclosure. The right of distress is not ordinarily incident to a mortgage, but is a right which arises by virtue of the relationship of landlord and tenant having been created between the parties, and this relationship in the case at bar, if it exists at all, has been created by a special covenant contained in the mortgage to that effect. If the mortgagee, therefore, wishes in this way to get the advantages of a landlord, he must take the same subject to the limitations incident to the relationship of landlord and tenant.

"I am, therefore, of the opinion that the mere fact that the plaintiff as landlord in this case happens also to be a mortgagee, does not strengthen his position. In that view, when the mortgagee distrained for \$2,602.40, and while the distress existed, the debt, to that extent, was suspended. The plaintiff, therefore, recovered judgment for a much larger amount than he was entitled to as disclosed by the material before the master."

#### *The Differing Manitoba Statutory Provisions.*

Mr. Hogg, in his book on the Australian Torrens System, paragraph "g," p. 948, lays it down that, "the fact that the mortgagee takes no estate in the land has the effect of making an attornment by the mortgagor as tenant to the mortgagee operate by way of estoppel only, so that, even if such a tenancy be created it will not bind third parties. Apart from this consideration, the utility of the attornment clause is open to the same doubt as under the general law. The statutory power of distraining on chattels upon the mortgaged land is not identical in the different jurisdictions, as will be seen hereafter, and the attornment clause may be of some use in some

jurisdictions to supplement the statutory remedy of distress," and he refers to *Jellicoe v. Wellington Loan Co.* (1886) 4 N. Z. L. R. 330, and *Tadman v. Henman* [1893] 2 Q. B. 168.

The Real Property Act of Manitoba contains a provision which does not appear in the Acts of the other provinces and which now appears as section 116 R. S. M. (1913) cap. 171, reading as follows:—"In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first mortgagee for the time being of land under this Act shall, until a discharge from the whole of the money secured or until a transfer upon a sale or order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity [the words "including the right to foreclose or sell through any competent Court" were dropped in 1913] as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee after an order for foreclosure shall have been entered in the register or shall, until the entry of such an order, render a first mortgagee of land leased under this Act liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenant expressed or to be implied therein." This section, which was added to the Act in 1902, 1-2 Edw. VII. c. 43, s. 10, and amended in 1906 by 5 & 8 Edw. VII. c. 75, s. 2, which added the words in brackets which were dropped in the revision of 1913, was considered in *Williams v. Box* (1910) 20 M. R. 588 and in *Smith v. National Trust Co.* (1910) 20 M. R. 522, affirmed in the Supreme Court of Canada (1911) 1 W. W. R. 1122. Duff, J., delivering

the judgment of the Supreme Court from which Idington and Anglin, JJ., dissented, said at p. 1131, "The contention is that the mortgagee is by virtue of this enactment in the same position for all purposes as if the legal estate were vested in him and it follows it is said as a necessary corollary that a conventional [contractual] power of sale confers upon a statutory mortgagee the same powers of disposition over the mortgagor's title as would be vested in a legal mortgagee at common law. The section read by itself with due attention to the phraseology employed appears to me to mean this: So long as the security is on foot as a security and the ownership of the land is, consequently, vested in the mortgagor the first mortgagee is to have certain rights and powers in respect of the land and they are to be the rights and powers to which he would by law be entitled if the legal estate were actually vested in him under an instrument such as that described. That is not to say—at least so it seems to me—that by this enactment the mortgagee is endowed with any power he had not already to extinguish the mortgagor's title or to convey an estate to a purchaser; and there are some considerations which I think make it impossible to give such an effect to the section. The first of those considerations is that this section as I have already mentioned was to be found in the Act which the judicial committee was discussing in the passage I have quoted, and I think if the intention in re-enacting the section in Manitoba had been to establish the law upon a footing different from that indicated in the view there expressed, we might have expected something explicit to indicate that intention. Then this section deals with the rights of the first mortgagee only. That would appear to indicate that those rights only are contemplated with which the law would invest a legal mortgagee as peculiarly incidental to his possession of the legal estate. If rights of foreclosure and sale independently of the other provisions of the act were in view there appears to be no explanation why the benefit of such rights was withheld from the holders of mortgages subsequent to the first. In considering,

moreover, the effect of the amendment embodied in section 108, it is to be observed that it must be read with other amendments which were introduced into the statute at the same time and particularly with the amendments affected by sections 100 and 110 of the Act. These latter amendments, it is true, are not expressly (as section 108 is) made applicable to existing mortgages. But it is not, of course, to be supposed that the last mentioned enactment having been declared to be applicable to existing as well as to future mortgages was intended to have an operation in respect of future instruments different from its operation in respect of those already existing; and we may properly look at the whole of the contemporary legislation which is *in pari materia* in order to ascertain the effect of any part of it. Sec. 100 makes explicit what, as I have already mentioned, was already implicitly in the Act; that the mortgage does not vest in the mortgagee any estate or interest in the land pledged as security. That section declares that the first mortgagee is to have no interest in the land—thus emphasizing the characteristic of the statutory mortgage upon which I have been dwelling, viz.: that as regards title the mortgagee has no registered interest but only powers of disposition.”

The effect of a similar section in the Act in force in Victoria, Australia, was considered in *Commercial Bank v. Breen* (1889) 15 V. L. R. 572, where the Court described the section as “a drag-net securing to the mortgagee, in addition to his rights and powers under the instrument, all his rights and remedies he would have as owner of the legal estate under the old law concurrently with a right in the mortgagor to enjoy the mortgaged land quietly until default.”

Mr. Scott, in his work on Torrens System mortgages, p. 42, asks the question: “Are the statutory remedies given to a mortgagee by the various acts exclusive or non-exclusive of other powers conventional or contractual which may be given to attain the same object as those aimed at by the statutory power, but by a different procedure?” and answers the question in the negative. Mr.



Thom (Canadian Torrens System), p. 298, inclines to the opinion that they are, referring to *Smith v. National Trust Co.* [p. 250, *ante*].

In Saskatchewan by the Land Titles Act (1917), s. 116: "A mortgagor may agree in writing to become the tenant of the mortgagee and in case of such agreement *heretofore or hereafter* made, the relationship of landlord and tenant shall be held to have been validly constituted between the parties for all purposes and as against all persons whomsoever. Provided that nothing herein contained shall affect the right of any parties in any action or other proceeding now pending."

A lease made by a mortgagee pursuant to a power thereto contained in the mortgage was held valid and the lessee entitled to rely upon it: *Warren v. Johns* [1920], 3 W. W. R. 568 [Alta.—Scott, J.].

## CHAPTER VI.

### RENT.

- ARTICLE 33: Rent defined.  
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Services.
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- ARTICLE 35: Sums in Gross.
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In Respect of Estate.  
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By Act of the Parties.  
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Attachment of Rent.

## RENT DEFINED.

ARTICLE 33.—Rent is a certain profit issuing annually, or rather periodically, out of lands and tenements corporeal, or out of them and their furniture in retribution (*reditus*) for the land that passes: it must always be a profit, but need not necessarily be a sum of money; it may be paid in kind or by the performance of services or partly in each way.

[Authorities: Stroud, 1710; Gilbert, Rents, 9; 12 Encyc. Laws of England, 653; 11 Hals. ss. 202 *et seq.*]

It has already been seen that no rent need be reserved: p. 2, *ante*.

*The Reddendum.*

See Article 14.

*Sums in Gross.*

See Article 35.

*Rent.*

“ ‘Rents’ be in divers manners, that is, Rent Service, Rent Charge, and Rent Seck”: Stroud, p. 1710 [2nd edn.]; 11 Hals. s. 202.

A rent charge arises where a person conveys to another land in fee simple, reserving a certain rent payable thereout with a clause of distress, the owner of the charge having no reversion in the land: see Co. Lit. 143b; *Bradbury v. Wright* (1781) 2 Doug. 628, see p. 364, *post*.

Rent seck or barren rent is in effect nothing more than a rent reserved by deed or will, but without any clause of distress, and differs from a rent charge only in being reserved without a clause of distress: Gilb. Rents, 38. The Statute 4 Geo. II. c. 28, s. 5, extends the remedy by distress to rents seck, rents of assize, and chief rents, and thereby in effect abolishes nearly all material distinctions between them: 1 Steph. Com. (11th ed.) 647; Com. Dig. tit. Distress (A. 1). See Article 57.

A fee farm rent is a rent charge reserved on a **grant** in fee: Co. Lit. 143b, n (5); *Governors v. Harrild* (1841), 2 M. & G. 713 (n).

Rent service is defined in *Harpelle v. Carroll*, referred to at p. 3.

And see further, Article 34.

*A certain profit.*

See Article 51, and notes, p. 375, *post*.

A rent is not uncertain merely because it cannot be ascertained at the time of the demise what rent will become payable on a future contingency. Where the rent was a certain sum subject to deductions if the lessor failed to supply steam power in connection with the premises, this was held immaterial: *Selby v. Greaves* (1868) L. R. 3 C. P. 594; 37 L. J. C. P. 251.

*Issuing out of Lands and Tenements Corporeal.*

Rent must necessarily issue out of lands and tenements corporeal, that is from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain: Gilb. Rents, 20; Co. Lit. 47-142a. And see 11 Hals. s. 210; 12 Encyc. Laws of England, 653.

Where the owner of a factory let "standings" in some of its rooms for lace machines, he himself supplying the steam power by which they were put in motion, it was held that there was no demise of the room, and consequently the weekly payments reserved could not be distrained for as rent: *Handcock v. Austin* (1863) 14 C. B. (N.S.) 634; 32 L. J. (C.P.) 252.

A royalty payable to a landlord upon the bricks which are made out of a brick-field is a rent, although it is not paid for the renewing produce of the land, but for portions of the land itself, which is gradually exhausted by the working, and such rent may be distrained for: *R. v. Westbrook* (1947) 10 Q. B. 178; 16 L. J. (M. C.) 87; *Daniel v. Gracie* (1844) 6 Q. B. 145; 13 L. J. (Q.B.) 309; *Edmonds v. Eastwood* (1858) 2 H. & N. 811, 826. The

same principle would apply on a lease of mines. And see *Lafave v. Lake Superior Corporation* (1903) 2 O. W. R. 715.

A. let to B. at a certain sum per annum a defined portion of a room in a factory, separated from the remaining portion, with exclusive possession and the use of steam power; and it was held that the supply of power was merely ancillary, and that the rent reserved would be construed as issuing out of the fixed property, though the use of the power formed part of the consideration for it; and that there was a right to distrain though the lease provided for deductions from the rent in case of the lessor's inability to supply all the power contracted for: *Selby v. Greaves* (1868) L. R. 3 C. P. 594; 37 L. J. C. P. 251; *Marshall v. Schofield* (1882) 52 L. J. Q. B. 58; 47 L. T. 406. And see Article 56 as to distress in such cases.

*Distress for rent.*

See Article 49 *et seq.*

*Out of lands and furniture.*

See Article 56.

*It need not necessarily be a sum of money.*

See Article 54 and notes as to "crop rents," and distress therefor.

It may be paid in kind and where the tenant agrees to pay as rent a certain portion of the crop to be grown upon the lands demised the landlord acquires an equitable interest in the growing crop which entitles him to maintain an action against third persons for an unlawful trespass upon or injury to such crop. *Tennant v. Rhineland*, [1918] 1 W. W. R. 70, 28 M. R. 302 (C.A.); *Elves v. Pratt*, *Forrester v. Elves and Pratt*, [1917] 1 W. W. R. 1384 (App. Div.); 11 Alta. L. R. 134; 32 D. L. R. 670. This is not the rule in Saskatchewan: see *Kidd v. Docherty*, *post* p. 263.

A tenant may agree to pay as rent a certain portion of the crop to be grown upon the lands demised, and as *Perdue, J.A.*, points out in *Tennant v. Rhineland* (*supra*), at p. 76—this kind of lease has become extremely common in the prairie provinces. The rights arising under such leases were for many years considered to be clearly defined, but recently the question has been approached from a new angle—and such decisions as *Tennant v. Rhineland* and *Elves v. Pratt*; *Forrester v. Elves and Pratt* (*supra*), show the necessity for a more careful consideration of the subject.

The case which has been most frequently considered and followed and which has only recently been doubted is *Hayden v. Crawford* (1833) 3 U. C. Q. B. (O. S.) 583.

The head note of that case accurately sums up the question considered as follows:—

“A. leased a farm to B. upon condition that B. was to deliver to him half of the wheat to be raised on the farm. B. was to harvest it, thresh it and deliver it into the defendant’s granary. Held, *per cur.*, that under this agreement A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the position of landlord and tenant, and that therefore no legal property in the wheat could vest in A. till the tenant had threshed it and delivered to him his portion.”

In *Campbell v. McKinnon* (1903) 14 M. R. 421, Killam, C.J., said, at p. 425: “I cannot interpret the clause giving the lessor the property in the crops as operating to prevent the lessee from ever having any property therein. The land was demised to the execution debtor and out of the crop a certain portion was to be paid over as rent. *Prima facie* the property in the whole until so paid over would be in the lessee. There is nothing to indicate that he was to cultivate the soil as the servant, agent, bailee or other instrument of the lessor. The construction that I would give to the instrument is that the legal property was to be in the lessee until delivery at the elevator for the lessor, but that from that time it was to be in the lessor.”

In the lease in this case there was a provision that all crops of grain grown upon the premises should remain the absolute property of the lessor until all the covenants, etc., in the lease should have been performed. See per Fullerton, J.A., in *Tenant v. Rhineland*, [1918] 1 W. W. R. at p. 83, as to the effect of this clause, and see p. 257, *ante*.

*Hayden v. Crawford* (*supra*), was followed in *Robinson v. Lott* (1909) 11 W. L. R. 59; 2 Sask. L. R. 276, reversing 2 Sask. L. R. 150; 9 W. L. R. 684.

*Hayden v. Crawford*, *Campbell v. McKinnon* and *Robinson v. Lott* were in turn followed in the Courts of the various provinces: see *Lott v. Given* (1911) 19 W.L.R. 713, 1 W. W. R. 338 (Sask.); *Anderson v. Scott* (1912), 3 W. W. R. 609 (Sask.), 22 W. L. R. 876, 8 D. L. R. 816; *Kidd v. Docherty* (1914) 7 Sask. L. R. 137, 6 W. W. R. 310, 27 W. L. R. 636; *Rex v. Hassell* [1917] 2 W. W. R. 48, 34 D. L. R. 370, 27 Can. Cr. Ca. 322 (Man.), and the principle laid down was followed in such cases as *Lamb v. Thompson* (1913), 24 W. L. R. 404 (Man.).

*Hayden v. Crawford* was a decision of a Court administering the common law. The Courts of the various provinces now administer both law and equity. In most of the provinces, as in England, the two systems are not "fused": See *Emerson v. Ind*, per Chitty, J. (1886), 33 Ch. D. 327; *Holmested*, 4; but in cases of conflict the rules of equity prevail, (*ib*); in Manitoba the systems are fused and amalgamated: Rule 998.

In *Elves v. Pratt*; *Forrester v. Elves and Pratt*, [1917] 1 W. W. R. 1384, 11 Alta. L. R. 134, 32 D. L. R. 670, the Courts first doubted whether *Hayden v. Crawford* should longer be followed, and Beck, J., advanced the opinion, in delivering the judgment of the Appellate Division, that the landlord upon the execution of the lease acquired an interest in the crop to be grown. The facts in the *Forrester* case follow:

On March 23rd, 1915, P. leased a farm to B. for eight months from April 1st, 1915, the rent being "one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the leased

premises. . . . Such share to be delivered on the day of threshing and said threshing shall be done on or before October 15th." On March 9th, 1915, an execution against P. was placed in the sheriff's hands. On August 3rd, 1915, *before the crop was cut*, one F. purchased P.'s interest in the crop, taking a bill of sale therefor, which was duly registered on August 4th, 1915. F. had then no notice of the execution. On September 29th, 1915, before F. had obtained delivery of his share of the crop the sheriff seized what he claimed to be P.'s one-third interest in the crop.

The Appellate Division considered *Hayden v. Crawford* (*supra*), Beck, J., who delivered the judgment of the Court, saying, at p. 1386: "Although this case has been followed, *e.g.*, in *Campbell v. McKinnon* (*supra*), I doubt very much whether it should be followed in a Court administering a complete system of jurisprudence embracing what was formerly law and equity, for it seems to be the more reasonable conclusion that, where a landlord is to be entitled to a portion of the produce of his own land as compensation for its use by a tenant, he by virtue of the contract in that respect acquires an interest in the entire crop in its undivided state, which may be sold or encumbered by the landlord and in respect of which, in the event of a threatened removal by the tenant, he might obtain an injunction on the ground of his actual interest and not merely on the ground of the removal or diminution of the property subject to distress. If the view I have suggested is correct—I do not intend to assert that it is—then P., the execution debtor, being the owner of an interest in the prospective crop, that interest became bound under our (*Alta.*) Rule 609 by the execution. Growing crops which are *fructus industriales*, and which, as emblements, would pass to the personal representative, and not to the heir, of the judgment debtor, can be seized under a *feri facias*. Halsbury's Laws of England, Vol. 14, tit. 'Execution,' p. 45; *Cochlin v. Massey-Harris* (1915) 8 *Alta. L. R.* 392, 8 *W. W. R.* 286, 30 *W. L. R.* 923, 23 *D. L. R.* 397 . . . " (The Court held that F. had not the notice required by the rule and



so took clear of the execution). And at p. 1387: "If on the other hand the law should still stand as decided in *Hayden v. Crawford*, the execution creditor cannot succeed, because, at the time of the seizure, the conditions there stated as precedent to the existence of any property in any portion of the grain in P., the landlord and execution debtor, had not arisen, *that is, there had not been a separation, appropriation and acceptance of any portion by P.*, and the sheriff, under the execution, had no right to interfere in any way with the crop or any part of it. And in this view the principle decided in (*Jacobsen and Weitzer v. International Harvester Co.* (*infra*)), would apply and *eo instanti* that the one-third share of the grain was so separated, appropriated and accepted, the bill of sale from P. to the claimant F. would attach, so as to prevent the execution attaching."

(*Quære*, per Beck, J., as to whether this transaction gave F. a preference).

This case was not referred to in *Rex v. Hassell*, [1917] 2 W. W. R. 48, 34 D. L. R. 370, 27 Can. Cr. Ca. 322 (Man.).

In the Hassell case the facts were:—M. leased to the accused certain lands at a rental of a one-third share of the crop to be grown on the lands, the arrangement being that the accused should put this one-third share in an elevator in M.'s name. The accused sold the whole crop and converted the proceeds of the same to his own use. On his trial on a charge of theft, Cumberland (Co. C.J.), considered *Hayden v. Crawford*, *Campbell v. McKinnon* and *Robinson v. Lott*, and held that M. was not the owner of the share of the wheat nor had he any *special property* or *interest* in it, and that the accused was not guilty of theft.

The learned County Court Judge also considered the effect of the provisions of the "Crop Payment Act" (1915), 5 Geo. V., c. 13, s. 2 (Man.), which reads as follows:—"In all cases in which a *bona fide* lease has been made and a *bona fide* tenancy created between a landlord and tenant, providing for payment of the rent reserved, or any part thereof or in lieu of rent, by the tenant

delivering to the landlord a share of the crop grown or to be grown on the demised premises or the proceeds of such share, then, notwithstanding anything contained in 'The Bills of Sale and Chattel Mortgage Act,' or in any other statute, or in the common law, the lessor, his personal representatives and assigns shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in said crops or the proceeds thereof, and to the interest of any person claiming through or under the lessee, whether as execution creditor, purchaser or mortgagor or otherwise, it being the intention of this Act that in all such cases the share of crops or of the proceeds thereof so agreed to be reserved for the lessor shall not, under any circumstances, be capable of alienation by the lessee whether voluntary or by any legal process against him," and held that while the section would afford a satisfactory protection to a landlord in an interpleader issue between himself and an execution creditor of the tenant, it would not enable the landlord to bring an action of replevin for an undivided portion of the crop, and that the landlord was not, under the Act, any more than he was before it was passed, the owner of any particular part of the crop so as to make it proper to convict the accused of theft upon an indictment in the form used.

The matter came squarely before the Court of Appeal for Manitoba in *Tennant v. Rhineland*, [1918] 1 W. W. R. 70. There, a landlord leased a farm, the rent reserved being one-third of the crop. The lease provided that the lessee would "immediately after the threshing, if required by the lessor, deliver the lessor's share of the crop, in the name of the lessor, in the elevator at R." After the crop was sown by the tenant it was injured by an overflow of water caused by the defendant, and the landlord sued for the damage.

It was held, Cameron, J.A., dissenting in a very strong judgment, that the landlord acquired an equitable interest in the growing crops which entitled him to maintain the

action: *Hayden v. Crawford* was not followed. The question of the injury to the reversion was not raised.

The Court applied the rule in *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191, and *Tailby v. Official Receiver* (1888), 13 A.C. 523; 58 L. J. Q. B. 75, that an assignment for value of property to be acquired or to come into existence in the future binds the property when it comes into existence. *Perdue, J.A.*, pointed out that the principle has long been applied to growing crops and crops to be grown: *Petch v. Tutin* (1846), 15 M. & W. 110; 15 L. J. Ex. 280. See also *Canada Permanent Loan & Savings v. Todd* (1895), 22 A. R. 515.

#### THE SASKATCHEWAN RULE.

It should be observed that the trend of authority in Saskatchewan is the other way. The Court *en banc* in *Kidd v. Docherty* (1914), 7 Sask. L. R. 137; 6 W. W. R. 310; 27 W. L. R. 636, considered the effect of *Tailby v. Official Receiver* (*supra*), in a case of a sale of land to be paid for by crop payments and held that before any property in the future crop would pass the crop must come into existence and be divided so that the purchaser's half would be capable of identification: *Tailby v. Official Receiver*, at p. 543, and *Robinson v. Lott*, followed.

#### THE PROVISIONS OF THE BILLS OF SALE ACTS.

In *Campbell v. McKinnon* (*supra*), the lease provided that all crops of grain grown upon the premises should remain the property of the landlord until all the covenants in the lease had been performed. *Killam, C.J.*, held that the lessor's lien was void under the provisions of the Bills of Sale Act, now R. S. M. 1913, c. 17, s. 33.

In *Tenant v. Rhineland*, *Fullerton, J.A.*, points out that the statute does not apply to prevent a landlord making a lease at a crop rent as there is no conveyance to the landlord intended to operate and have effect as security. The conveyance to the landlord is consideration for the use of the farm—the rental itself and not

security for the rental, [1918] 1 W. W. R. 84, 28 M. R. 302.

In *Kidd v. Docherty* (*supra*), the corresponding section in the Saskatchewan Act was held to forbid an agreement between a vendor and purchaser that half of all crops grown in the land should remain the property of the vendor until the principal and interest was fully paid.

Attention might be directed here to the case of *Jacobson and Weitzer v. International Harvester Co.* (1916); 10 W. W. R. 995; 34 W. L. R. 879; 28 D. L. R. 582 [Alta.], which was referred to in the judgment of Beck, J., in *Elves v. Pratt*, quoted at p. 259, *ante*. W. advanced certain money to J. to enable J. to plant a crop. W. was to get in return one-third of the grain but was to bear no other expense in connection with the crop, and as between them J. was to be liable for all debts. Stuart, J. (1915), 9 W. W. R. 87; 32 W. L. R. 332, held that W. was not a partner with J., but that what took place was a sale by J. to W. of a one-third interest in the property to come into existence in the future. He also held that s. 15 of the Bills of Sale Ordinance (Alta.), corresponding to the sections of the Manitoba and Saskatchewan Acts above referred to, did not apply and that W. was entitled to his one-third of the crop as against the sheriff who had seized the grain, unharvested, under the execution against J. This judgment was upheld by the Appellate Division.

### *Form of Agreement.*

The practice has grown up amongst conveyancers preparing such crop-leases to provide for a payment of a money rent on a fixed date, and that in lieu thereof the landlord will accept the certain portion of the crop agreed upon.

### *McArthur v. Niles, Limited.*

The plaintiff was, by the terms of his lease, entitled to receive from his tenant S., one-third in kind of all the crops grown during 1917 on the demised lands. One of such crops was the crop of peas grown by S. from the

seed supplied to him by the defendants under an agreement, made subsequent to the lease, which provided that the peas grown from such seed should "in all conditions"—that is, after as well as before severance—be and remain the property of the Niles Company. The plaintiff was not a party to the agreement between S. and the defendants.

When S. thus agreed that the defendants should be entitled to all the crop of peas, he was subject to a covenant to deliver one-third of that very crop to the plaintiff.

This he did, and the defendants broke into the plaintiff's granary, seized and carried away the peas. In an action for trespass and conversion the plaintiff succeeded. Meredith, C.J.C.P., said:

"The only question there can be is, whether the plaintiff had a prior right to the peas in question under the transaction between Stutt and him.

"The transaction is evidenced by a printed lease of a very formal character, which is signed by the parties to it, and purports, in proper technical language, to be a demise of the land for one year, the rent reserved being \$1, payable on the day of the date of the lease, 'and one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises.'

"If the transaction were really a demise of the land, giving the tenant the exclusive right of possession of it for the year, with a right in the landlord only to distrain for rent at the end of the year, it ought to be obvious that he had no right which could prevent Stutt making the bargain which he did make with the defendants: and that no delivery of the peas by Stutt to the plaintiff could deprive them of their right to them.

"On the other hand, if the form of the transaction be disregarded, and if it be considered one under which the plaintiff was at all times to have a one-third share of all the crops grown upon his land, it may well be that that earlier right should prevail over the later-acquired rights

of the defendants, provided that, under the real agreement between this plaintiff and Stutt, Stutt had not power to make such an agreement as that which he actually made with the defendants to grow the seed peas for them.

“So that it really all comes down to that simple question: did the plaintiff acquire a right to one-third of all crops grown by Stutt on the plaintiff’s land, without any right in Stutt to make for the plaintiff, as well as himself, the agreement he did make with the defendants—acquire it when the lease was made? If so, this appeal should be dismissed, otherwise it should be allowed and the action should be dismissed.

“Under all the somewhat unusual circumstances of the case, I incline to the view that the plaintiff did acquire such a right without conferring on Stutt such a power, and so would dismiss the appeal. The plaintiff was to have one-third of the crop; and no time was fixed for payment of the rent if the one-third of the crop was merely rent reserved. All the circumstances point, perhaps, more to ‘working on shares’ than to a real demise, though there is much to be said in favour of the view that the one-third of the crop which the landlord was to have is, as to the crop of peas in question, one-third of the gross income from the transaction with the defendants.”

*McArthur v. Niles, Limited* (1919) 45 O. L. R. 280: (283) 16 O. W. N. 46; 48 D. L. R. 45 [App. Div.].

Unless there is a covenant on the part of the tenant to crop the lands the landlord has no recourse against the tenant—but such a covenant will be implied upon the principle of *Hamlyn v. Wood* (*infra*) [and see p. 158, *ante*] and also (*semble*) from the provision as to payment of the share of the crop in each year.

*Dunsford v. Webster* (1903) 14 M. R. 529, 23 C. L. T. 290 (Richards, J.): This was a case of a lease of a farm upon the crop payment plan with covenants by the tenant to cultivate, to plough to a certain depth and to crop the lands. Later at the tenant’s request a new lease was made to his wife, ante-dated so as to bear

the same date as the first one. The second lease, through mistake or carelessness in the office of the solicitor by whom it was prepared, did not contain the covenant to cultivate and in the third year of the five-year term the cultivated portion was reduced from 117 acres to 4 acres. The landlord sued for breach of covenant to cultivate, crop and plough in 1902. Richards, J., followed *Hamlyn v. Wood*, [1891] 2 Q. B. 491 (set out at p. 158), and said, at p. 533: "The main, if not the entire, object of both parties in entering into the second lease, as well as the first, was the getting from the lessee's cultivation and cropping of the land a yearly crop from which each party would profit. It was the plaintiff's sole object, and nearly every provision throughout the leases is one that concerns in some way the cropping. If the defendant's contention was correct, she would have omitted to crop and cultivate in other years as well as in 1902. It ought not, I think, to be held that the second lease was made with the intention that defendant could have the power to make it profitless to the plaintiff. The defendant bound herself to plough four inches deep in each year. That seems to mean that she would plough for the purposes of cultivating and cropping. She would hardly place that onus on herself unless it was intended that she should also crop in each year. Then the wording of the above-quoted provision in the second lease, as to payment to the lessor of a third of the crop in each year, would imply that a crop was to be grown in each year of the term. The defendant alleges that by the end of 1901, the land had been cropped for so many successive seasons that it would not have been good husbandry to crop it in 1902, and that it then needed a year's rest. I do not think she proved that allegation, and I am unable to see that if she had done so it would be optional with her to refuse for that reason to cultivate the crop. There is a provision in both leases negating the idea that the tenant was to summer-fallow. That is evidence of an intention not to give the land a rest."

The damages allowed to the plaintiff were the rent he had lost upon the basis of the crop of the previous year and for deterioration in the value of the lands from the tenant omitting to plough, cultivate and crop in 1902.

The plaintiff at the trial abandoned his claim for rectification of the lease.

The subject of implied covenants is dealt with in Article 15, and see Article 102 as to Repairs.

### *By the Performance of Services.*

*Doe v. Benham* (1845) 7 Q. B. 976, and see Article 55.

The undertaking of the lessee to perform an isolated piece of work on the demised premises cannot be treated as rent. *Cristall v. Loney & Mackinnon* (1916) 9 W. W. R. 1205 [Ives, J.—Alta.].

### *Partly in Each Way.*

Rent may be payable one-half in cash and one-half in work: *Jones v. Montgomery* (1871) 21 U. C. C. P. 157.

In *Finley v. Miller* (1909) 7 E. L. R. 103; 29 C. L. T. 1069, the lessor who boarded with his lessee agreed to accept his rent in board, and the lessee agreed so to pay it. Held, a defence to an action for board.

### *What Rent Is.*

“Rent accruing due is an incorporeal hereditament, *Kennedy v. MacDonell* (1901) 1 O. L. R. 250 [Div. Ct.], but rent which has accrued due is a mere chose in action”: *Brown v. Gallagher & Co., Ltd.* (1914) 31 O. L. R. 323.” [Middleton, J.]: where it was held that rent which has accrued due does not pass to a purchaser of the reversion unless expressly assigned: *Flight v. Bentley* (1835) 7 Sim. 149; *Sharp v. Key* (1841) 8 M. & W. 379; *Salmon v. Dean* (1851) 3 Macn. & G. 344, followed.

The question of the rights of all parties on an assignment of the term or the reversion are dealt with in Chapter XVI., *post*.



## TAXES AND MONEY TO BE SPENT.

ARTICLE 34.—But “rent” has a fixed legal meaning, and does not include all payments which a tenant is bound to make under the terms of his lease; money to be expended on improvements or repairs or taxes is not rent, because not reserved or payable to the lessor.

[Authorities: *Finch v. Gilray* (1889) 16 A. R. 484; 16 O. R. 393; *Coffin v. North American Land Co.* (1891) 21 O. R. 80].

*Money to be Expended in Taxes.*

An agreement to pay the landlord every year for rent an amount equal to the taxes, which might be discharged by paying the taxes, would be a good reservation: *Davis v. McKinnon* (1871) 31 U. C. R. 564.

But an agreement to pay taxes to the municipality is not: *Finch v. Gilray* (*supra*); *Re Justices Richmond* (1893) 10 T. L. R. 68. As to payments in the nature of rent and not instalments of purchase money, see *Barrs v. Lea* (1864) 33 L. J. Ch. 437; 12 W. R. 525.

In *Finch v. Gilray* (*supra*) the lease provided for payment of a sum by way of rent and a further sum by way of taxes; it was held that the payment of the latter alone did not prevent the operation of the Statute of Limitations.

This decision was followed in *Coffin v. North American Land Co.*, where the lessee was “to pay rent for the said land, which rent is to be the taxes and assessment thereon.”

The above cases and *Davis v. McKinnon*, were considered and *Finch v. Gilray* applied in *Brennan v. Finley* (1905) 9 O. L. R. 131, 5 O. W. R. 251 [Idington, J.]. There a lessee who became unable to pay his rent agreed to pay taxes and water rates and deduct them from his rent. From that time on for eleven years he paid no rent, but

did pay the taxes and rates. It was held that the payments were not made as rent and were no bar to the Statute of Limitations.

Reference should be made here to *Dominion Improvement and Development Co. v. Lally* (1910) 24 O. L. R. 115 [C. A.], 19 O. W. R. 462; 2 O. W. N. 1224; 17 O. W. R. 151; 2 O. W. N. 155 [Boyd C.], where this matter is touched upon, and *Bowman v. Watts* (1909) 13 O. W. R. 481.

The whole matter was considered by the Appellate Division in (1914-5) in *East v. Clarke*, 33 O. L. R. 625, 23 D. L. R. 74, where *Finch v. Gilray* was distinguished, Garrow, J.A., saying at p. 631: "The defendant's obligation to pay the taxes only arose upon his being placed in possession under the agreement with the plaintiff's husband, and under that agreement the defendant expressly agreed to pay the taxes, not merely as taxes but as rent. And in paying the taxes he was, therefore, primarily at least, performing his part of the agreement, and the circumstance that in so doing he was also discharging an obligation incidentally imposed by the assessment law upon both tenant and owner seems to me to be of no consequence. It would, of course, be otherwise but for the agreement, for it may well be conceded that the mere payment of taxes by an occupant of land would not in itself be an acknowledgment of title or prevent the operation of the Statute [of Limitations]. And, giving full effect to the decision upon the facts in *Finch v. Gilray*, that the same result would follow where there is a specific reservation of another and different sum as rent, I am quite unable to see why, where no other sum is reserved, the parties may not lawfully agree that the tenant shall pay the taxes as rent, nor why the sum so agreed to be paid and paid should not for all purposes be regarded as rent."

*Finch v. Gilray* (*supra*) was followed and *East v. Clark* (*supra*) was distinguished in *Boone v. Martin* (1920) 47 O. L. R. 205; 53 D. L. R. 25 [Rose, J.—App. Div.].

In *Mathieu v. Lalonde* (1917) 13 O. W. N. 186 [App. Div.], reversing 12 O. W. N. 373, it was held on the evidence the defendant was in possession as tenant paying rent by way of payment of taxes and of work done upon the land.

See also the cases dealing with the Statute of Limitation discussed at p. 898, *post*.

### *Covenants to Pay Taxes.*

By the Landlord and Tenant Act, R. S. O. 1914, c. 155, s. 27 (1):—

“Unless it is otherwise specifically provided in a lease made after the commencement of this Act, a covenant by a lessee for payment of taxes shall not be deemed to include an obligation to pay taxes assessed for local improvements.”

The Saskatchewan Act of 1919 [9 Geo. V. c. 79] copied this section as section 17.

In Nova Scotia a landlord may distrain for taxes paid by him for his tenant; R. S. N. S. 1900, c. 73, s. 139.

Where a tenant who has covenanted to pay taxes does not do so and the landlord is obliged to pay them the landlord is not subrogated to the position of the municipality so as to permit him to distrain, nor is he entitled to a preferential lien for the amount of the taxes paid: *Boone v. Martin* (1920) 47 O. L. R. 205; 53 D. L. R. 25 [App. Div.—Rose, J.].

Where certain land was leased to N. it was exempt from taxation by virtue of a special act. Before the expiration of the term a statute was passed directing that land leased by the lessor to any person “shall be assessable . . . against such lessee.” It was held by Riddell, J., that the act only applied to future leases and that the land was not assessable in the hands of N. under the lease: *Noble v. Township of Esquesing* (1920) 47 O. L. R. 255, but the contrary view was taken by the Appellate Division (1920) 48 O. L. R. 520.

In *Campbell v. Wallaceburg (Town)* (1909) 14 O. W. R. 473; 29 Occ. N. 1113, it was held that there was an

excessive distress for taxes when the amount of rent in arrear was only \$250, and goods to the value of \$645 has been seized.

In *Booth v. Callow* (1913) 4 W. W. R. 73 [B. C.—Gregory, J.], a lease was rectified by striking out the lessee's covenant to pay taxes which was retained in a printed form by mistake.

When a lessee covenants to pay taxes he cannot take advantage of any neglect to do so. K. and others on 1st October, 1880, leased to C. and another two parcels of land for four years, the lessees covenanting to pay all taxes, rates, etc., "which now are, or which during the continuance of the term hereby demised shall at any time be rated," etc. In March, 1881, the lessors mortgaged one of said parcels to H. In December, 1883, part of the mortgaged land was sold to C. for arrears of taxes to 31st December, 1882; and a conveyance was subsequently made to him by the warden and treasurer. It appeared that the land was sold for taxes due for the years 1880 and 1882, with interest and costs. In an action brought by the mortgagee, H., to set aside the tax deed as a cloud on the title, or to have the tax purchaser declared a trustee for him, it was held that such purchaser could not hold the title so acquired against his lessors and the plaintiff, he, as one of the lessees, being bound under the covenant to pay the taxes for which the lands were sold: *Heyden v. Castle* (1888) 15 O. R. 257.

### *Interpretation of Covenants.*

A lessee covenanted to repair and to pay, bear and discharge all land tax, sewer rates, main drainage rate, and all other rates, taxes, assessment charges or impositions whatsoever, parliamentary, parochial or otherwise, taxed, charged, assessed or imposed upon the demised premises, or on the lessor for or in respect of the premises. The lessee failed to repair, in consequence of which a drain on the premises got out of order and caused a nuisance. The sanitary authority made an order on the lessee under the Public Health Act, directing him to

repair the drain, and it was held that the lessor was entitled to recover from the lessee the expenses of repairing the drain: *Smith v. Robinson* [1893] 2 Q. B. 53; 62 L. J. (Q. B.) 509.

A landlord executed certain works on the demised premises, under notice from the sanitary authorities to abate a nuisance, and it was held that he could not recover the expense of such works from the tenant upon the latter's covenant to pay "all taxes, rates, charges, assessments and impositions whatever imposed on the premises by authority of Parliament or otherwise howsoever": *Rawlins v. Briggs* (1878) 3 C. P. D. 368; 47 L. J. (C. P.) 487.

But where the word "duties" was also contained in the covenant, the majority of the Court of Appeal held that the lessor might recover: *Budd v. Marshall* (1880) 5 C. P. D. 481; 50 L. J. (C. P.) 24 [C.A.]; see also *Re Bettingham* (1892) 9 T. L. R. 48; *Clayton v. Smith* (1895) 11 T. L. R. 374.

But under a covenant to pay "rates, taxes and assessments," the tenant is not liable for a sum assessed upon the landlord as his proportion of the expense of paving a street upon which the demised premises abut, this being a charge imposed upon the owner for the permanent benefit of the property: *Wilkinson v. Collyer* (1884) 13 Q. B. D. 1; 53 L. J. (Q. B.) 278; see, however, *Aldridge v. Ferne* (1886) 17 Q. B. D. 212; 55 L. J. (Q. B.) 587; *Batchelor v. Bigger* (1889) 60 L. T. 416.

A lessee covenanted to pay "all taxes, rates, duties and assessments whatsoever which, during the continuance of the demise, should be taxed, assessed or imposed on the tenant or landlord of the demised premises in respect thereof;" it was held that a charge for paving the street, which had been imposed *in invitum* against the owner and tenant, was a duty or assessment which the latter was bound to pay under the covenant: *Thompson v. Lapworth* (1868) L. R. 3 C. P. 149; 37 L. J. (C. P.) 74; *Tidswell v. Whitworth* (1867) L. R. 2 C. P. 326; 36 L. J. (C. P.) 103.

Where a lessee covenants to pay "all rates, taxes, charges and assessments whatsoever, which now are or may be charged or assessed upon the premises or upon any person in respect thereof," and the Board of Health requires the lessor to sewer, level and pave the street in which the demised premises are situate, this will be a "charge upon the premises," and "upon a person in respect thereof," within the meaning of the covenant: *Hartley v. Hudson* (1879) 4 C. P. D. 367; 48 L. J. (Q. B.) 751; see, however, *Rawlins v. Briggs* (*supra*). Where a lessee covenanted that he would pay all taxes, charges, rates, tithes, or rent charge in lieu of tithe, dues and duties whatsoever as then were, or should at any time thereafter during that demise be taxed, charged, assessed or imposed upon the said demised premises; it was held, that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself: *Hurst v. Hurst* (1849) 4 Exch. 571. Where a person took a part of certain premises, the whole of which was rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof: it was held that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises: *Watson v. Atkins* (1820) 3 B. & Ald. 647; *Graham v. Wade* (1812) 16 East, 29. A tenant of marsh lands, who agreed to pay all outgoing whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be chargeable upon the lands, the present land tax excepted, is liable to pay an extraordinary assessment made by the commissioners of sewers for a work of permanent benefit to the land: *Waller v. Andrews* (1838) 3 M. & W. 315; *Palmer v. Earith* (1845) 14 M. &

W. 431; *Sweet v. Seager* (1857) 2 C. B. N. S. 119. A covenant by the tenant to pay all taxes, rates, duties, levies, assessments and payments will extend to the costs for paving footways, which, by a local Act passed before the lease was made, were made payable by the tenants of the adjoining houses, and which they were allowed to deduct from their rents, in the absence of any express stipulation to the contrary: *Payne v. Burrridge* (1844) 12 M. & W. 727.

A lessee who covenanted to pay "all taxes, rates, assessments and outgoings of every description" was held liable for the expense of altering drains in accordance with the orders of the municipal authorities under the Public Health Act: *Stockdale v. Ascherberg* [1904] 1 K. B. 447; 73 L. J. (K. B.) 206 [C.A.]; 24 C. L. T. 107, affirming [1903] 1 K. B. 873; 72 L. J. (K. B.) 492; 23 C. L. T. 259.

A lessee who covenanted to pay all "rates, taxes and assessments whatsoever" was held not liable to pay a frontage tax assessed against the property because the work had been completed before the lease was made, although the apportionment of cost between the frontagers had not been made until after the creation of the tenancy: *Lumby v. Faupel* (1904) 20 T. L. R. 237; 24 C. L. T. 107 [C. A.], affirming (1903); 19 T. L. R. 457; 23 C. L. T. 259.

*South Australian Brewing Co. v. Hill* [1919] A. C. 519; 88 L. J. (P. C.) 48 (Australian Appeal). The lease contained a covenant by the lessee to "pay all rates, taxes, charges, assessments, impositions and other outgoings whatsoever which at the commencement of the term hereby granted, or at any time thereafter during the said term, shall or may be rated, taxed, charged, assessed or imposed on the premises hereby demised, except the land tax." At the date of the lease there was a State Land Tax payable in respect of the demised premises. Later, and during the continuance of the term, a Federal Land Tax was imposed. It was held that the exception could not be construed to include the Federal tax: it could only be construed having regard to the conditions as they existed at that time.

The plaintiff owned a building which was by statute exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion was used for other purposes, and the society paid taxes on that part for some years. It then leased that part to A. to be used for purposes other than that of the society. A. covenanted to pay all . . . taxes . . . which might be payable or chargeable against the premises by reason of the manner in which the same were used by A, the lessor agreeing to continue to pay "the regular ordinary taxes." It was held that the lessor was bound to pay the taxes on the increased valuation of the portion so demised when it was raised from \$1,000 to \$10,000: *Saint Mary's Young Men's Total Abstinence Society v. Albee* (1910) 43 S. C. R. 288; 7 E. L. R. 435; 30 C. L. T. 530 [N. S. Appeal], affirming (1909) 6 E. L. R. 582.

A lessor demised a house and covenanted to pay all rates "now payable or hereafter to become payable in respect of the premises." The tenants sublet at a profit and therefore at the next valuation the assessment of the premises was raised. It was held that the lessor was bound to pay the entirety of the rate on the new assessment, distinguishing *Watson v. Home* (1827) 7 B. & C. 285; *Smith v. Humble* (1854) 15 C. B. 321, and *Mansfield v. Reef* [1908] 1 K. B. 71, in each of which cases the assessment was increased owing to buildings erected by the tenant, and it was held that the lessor was only bound to pay the part of the rate or tax attributable to the unimproved value of the property: *Salaman v. Halford* [1909] 2 Ch. 64, 602; 30 C. L. T. 120, 628; W. N. 198; 44 L. J. (Ch.) 628 [North, J.—C.A.].

Covenant to pay "all existing and future taxes, rates, duties, assessments, impositions and outgoings of every description." The lessee was bound to pay the expense of making structural alterations under the Factory Act, this being an imposition or outgoing: *Goldstein v. Hollingsworth* [1904] 2 K. B. 578; 73 L. J. (K. B.) 826; 24 C. L. T. 238.



“All existing and future taxes, rates, assessments and outgoings of every description,” include the cost of certain structural alterations made pursuant to the directions of the local authority, for the purpose of enabling the premises to be used as a bake house, and there was no power under the Factories Act to apportion the cost between the lessor and lessee: *Morris v. Beal* [1904] 2 K. B. 585; 73 L. J. (K. B.) 830; 24 C. L. T. 293.

“All taxes and outgoings of every description in respect of the demised premises”: cost of certain alterations in a factory so as to provide means of escape in case of fire held to be outgoings: *Horner v. Franklin* (1904) 20 T. L. R. 791; 24 C. L. T. 331.

Covenant to pay all present and future rates, taxes, etc., charged upon the premises. Covenant by sub-lessee to observe and perform all lessee's covenants. Rates charged before the making of the sub-lease, but not payable until after, were not within the sub-lessee's covenant: *Stock v. Meakin* [1900] 1 Ch. 683, followed: *Surtees v. Woodhouse* [1903] 1 K. B. 396; 23 C. L. T. 157.

All rates, taxes, assessments and impositions whatsoever, included costs of alterations ordered by the sanitary authority: *Re Warriner, Brayshaw v. Ninnis* [1903] 2 Ch. 367; 72 L. J. (Ch.) 701; 23 C. L. T. 312.

“All taxes, rates, including sewers, main drainage assessments and impositions whatsoever, which are now or which may at any time be taxed, rated, assessed, charged or imposed upon or in respect of the said premises or any part thereof, on the landlord, tenant or occupier of the same premises by authority of Parliament or otherwise howsoever.” The lessee was bound to repay to the lessor the cost of removing a defective privy and building a water-closet, the work having been done by the lessor pursuant to notice given him by the proper sanitary authority under the Public Health Act: *Foulger v. Arding* [1902] 1 K. B. 700; 71 L. J. (K. B.) 499 [C.A.], reversing [1901] 2 K. B. 151.

A lessee was given power by his lease to build over a lane to the north of the premises demised, and he covenanted to pay all taxes “to be charged upon the demised

premises or upon the said lessor on account thereof." It was held on an equal division of the Court affirming the judgment of Meredith, C.J.C.P. (1896) 26 O. R. 489, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane. All the members of the Court however held that it was a question of assessment: that the apportionment of the assessment made by the Assessment Department was final: and as the Department had assessed the lessor in respect of the lane for its full value as vacant land, and the lessee in respect of the addition as so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him: *Janes v. O'Keefe* (1896) 26 A. R. 129; 16 Occ. N. 41; 26 O. R. 489. The following are cases where a covenant to pay taxes was considered: *Isaacs v. Arlidge* (1917) 34 T. L. R. 102; *Cumberland v. Kearns* (1889) 17 A. R. 281; *Wise v. Rutson* [1899] 1 Q. B. 474; *Baylis v. Jiggins* [1898] 2 Q. B. 315; *Floyd v. Lyons* [1897] 1 Ch. 633; *Brett v. Rogers* [1897] 1 Q. B. 525; *Farlow v. Stevenson* [1900] 1 Ch. 128; *Brown v. Tolmon* [1907] 1 Ch. 616.

### SUMS IN GROSS.

ARTICLE 35.—If a lessee simply covenant to pay a certain sum without mentioning it as a consideration for the demise of the premises, the sum so paid will not be rent properly so called but a sum in gross.

[Authorities: *Smith v. Mapleback* (1786) 1 T. R. 441].

So under a contract for a building lease, where sums in the nature of rent are from time to time to be paid before the lease is granted, such payments are sums in gross and not rent: *Howlett v. Tarte* (1861) 10 C. B. N. S. 813; *Camden v. Batterbury* (1859), 7 C. B. N. S. 864.

So where a sum of money is made payable for goodwill over and above the rent, the additional sum, though

payable annually, is not to be considered as rent, but only as a sum in gross: *Smith v. Mapleback* (*supra*); *Davies v. Stacey* (1840) 12 A. & E. 506.

In *Kelly v. Irwin* (1867) 17 U. C. C. P. 351, it was held that an agreement after the expiration of the first year of a tenancy for an abatement in the rent for that year could not create a new demise; the sum agreed to be paid was not rent but merely a sum in gross and could not be distrained for.

### COMMENCEMENT OF RENT.

ARTICLE 36.—Rent may commence before the lessee enters upon the enjoyment of the land.

Authorities: *Adams v. Hagger* (1879) 4 Q. B. D. 480; 41 L. T. 224 [C. A.]; *Re Hulbert & Mayer* [1917] 1 W. W. R. 380 [*Alta*].

Where there was an agreement not under seal for a lease of a piece of land at a certain rent for ninety-nine years so soon as the lessee should have erected upon it a messuage, and the latter undertook until the execution of the lease "to hold the said piece of land and other the premises at the rent and subject to the conditions to be contained in the lease," the lessee never entered upon or took possession of the land, and it was held that though there was no demise, there was a contract independent of and collateral to the intended lease, whereby the lessee had undertaken to pay the rent, and he was held liable therefor: *Adams v. Hagger* [*supra*].

Walsh, J., held, in *Re Hulbert & Mayer* (*supra*), that the liability of a tenant upon a covenant to pay rent arose at the time of entering into the covenant and not at the time the rent was to be paid, and that such liability did not depend upon possession at all. He held that the Volunteers' and Reservists' Relief Act applying to protect volunteers from liabilities incurred before its date applied to protect a tenant from a distress for rent falling due after the date of the Act under a lease executed before the Act was passed.

*The Necessity for Possession.*

As to possession generally see Articles 19 and 20.

An action for rent against a tenant who had never been in possession or received a valid lease was dismissed. The plaintiff failed to prove compliance with the conditions of the defendant's application to the agent for a lease: *Lauder v. Peltier* (1909) 11 W. L. R. 333; 29 C. L. T. 1086.

Where a tenant agrees to lease on the terms that the tenement have certain fittings, he is not bound to take possession if such fittings are not put in. A. agreed to let a shop to B. in the same state that the tenant then in possession had it, and the latter on quitting removed some gas fittings which formed part of the shop, in consequence of which B. refused to take possession, and it was held that he was not liable for the rent: *Dunn v. Howard* (1850) 5 [1 Allen] N. B. R. 615.

When there is no writing under the Statute of Frauds, the fact that the defendant obtained the key and then examined the house and left the key in the door saying he would take it, would not be an entry sufficient to support an action for the rent: *Bank of Upper Canada v. Tarrant* (1860) 19 U. C. R. 423.

But where the lease is under seal rent may be sued for before entry: *Lowe v. Ross* (1850) 5 Exch. 553-6, per Parke, B.; see also *Bellasis v. Burbricke* (1696) 1 Salk. 209; 1 Ld. Raym. 170; and the case of *Bank of Upper Canada v. Tarrant* (1860) 19 U. C. R. 423, seems to have turned upon the ground that there was no actual lease, but only an invalid agreement.

Where there was an agreement for a lease, at a rental to be fixed by arbitration, as soon as the rental was fixed the defendant became liable to pay the fixed rental, and ceased to be liable only when the lease was forfeited: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, followed: *Toronto General Hospital Trustees v. Sabiston* (1919) 44 O. L. R. 639; 16 O. W. N. 167; 47 D. L. R. 324, affirming 15 O. W. N. 333 [Middleton, J.] [App. Div.].

## ENTIRE RENT: SEVERAL PARCELS.

ARTICLE 37.—When rent is single or reserved entire, and several estates are let for the same term at one gross rent, every parcel of land is liable for the whole rent, however distinct the premises may be, even though they lie in different parishes.

[Authorities: *Leonard v. Buchanan* (1838), 6 U. C. (Q. B.) O. S. 410; per Robinson, C.J.].

But where the rent is not originally reserved entire, but the reservation is several and apportioned to the several things demised, then each is only chargeable with its own rent: *Gilb. Rents*, 34-5. If two or more hereditaments be demised by one lease at distinct rents, each is charged only with its own rent: *Yanfield v. Rogers* (1594), *Cro. Eliz.* 341; *Gilb. Rents*, 36. Where there is a demise of premises and an entire rent reserved, if any part of the premises could not be legally demised the whole demise is void: *Doe v. Lloyd* (1800) 3 *Esp.* 78. A lessee of one hundred acres of land upon entry found eight acres in the possession of A., who was entitled under a prior lease from the lessor, and A. kept possession until half a year's rent became due, the lessee continuing in possession of the remainder. It was held that the demise of the 100 acres was wholly void as to the eight acres; there being an original defect in the demise itself by which an entire rent was reserved, it was different from the case of an eviction by title paramount and the rent could not be apportioned, so the lessor was not entitled to distrain for the whole or any part of the rent: *Neale v. MacKenzie* (1836) 1 *M. & W.* 747; *Carey v. Bostwick* (1852) 10 *U. C. R.* 156. This case was followed in *Kelly v. Irwin* (1867) 17 *U. C. C. P.* 351, where there were two prior occupants, and it was held that the rent could not be apportioned because the tenant had never been subject to the entire rent by virtue of the demise. In *Neale v. MacKenzie* (*supra*), the lease was by parol, and so not good as a grant of the reversion in the eight acres. When the

lease is under seal it will operate as a grant of the reversion to any portion of the demised premises held under a prior lease, and therefore the lessor will be entitled to distrain for the whole rent, though his grantee does not obtain possession of the entire premises: *Holland v. Vanstone*, (1867) 27 U. C. R. 15; see also *Jarvis v. McCarthy* (1845) 5 N. B. R. 63; *Kelly v. Irwin* (*supra*), is an authority in the case of a parol demise only.

### WHEN RENT PAYABLE.

ARTICLE 38.—When rent is reserved generally and no mention is made of half-yearly or quarterly payments, nothing is due until the end of the year.

[Authorities: *Cole v. Sury*, (1627) Latch, 264; Com. Dig. Rent (B.) 8; *Gray v. Chamberlain* (1830) 4 C. & P. 260; *Coomber v. Howard* (1845) 1 C. B. 440, *McIntosh v. Leckie* (1906) 13 O. L. R. 54; 8 O. W. R. 54; 8 O. W. R. 490; 26 Occ. N. 804 [Boyd C.], and see the notes to Article 54 as to crop-leases].

#### *A Time Certain.*

In answer to an argument that a distress should be restrained by injunction as upon the landlord's own showing, the rent was not payable "at a time certain" and so there could be no distress. Middleton, J., in refusing the injunction, said that the argument "rested upon a legal proposition by no means clear or indisputable." He referred to Foa, 4th Edn. 483: Ency. Laws Eng. IV., 291, and Coke Litt. 42a and 147a; *Neal v. Rogers* (1910) 17 O. W. R. 1070, at p. 1071, 2 O. W. N. 507.

And see this case upon an appeal from the Master in (1911) 19 O. W. R. 132, 2 O. W. N. 1107. But see *Re D. & S. Drug Company*, noted at p. 376, *post*.

This question was raised with reference to crop rents discussed in Article 54, *post*, and it was argued in *Dick v. Winkler* [p. 385, *post*] that there could be no distress because the rent was not payable at a time certain, but

Killam, C. J., would not give effect to the argument; and see *Foster v. Moss* (1911) 17 W. L. R. 174 [Sask.].

### RENT PAYABLE IN ADVANCE.

ARTICLE 39.—Where rent is intended to be payable in advance, it should be clearly expressed whether the payment in advance is intended to be of the current quarter from time to time during the whole term or the first payment only.

[Authorities: *Holland v. Palser* (1817) 2 Stark. 161; *Hopkins v. Helmore* (1838) 8 A. & E. 463].

A parol agreement to pay rent in advance is binding: *Galbraith v. Fortune* (1860) 10 U. C. C. P. 109.

Where a house is let upon a yearly tenancy under an agreement whereby the rent is reserved “payable quarterly on the usual quarter days, and always if required in advance,” the rent is due in advance whether demanded or not, but the landlord cannot resort to his remedies for non-payment of the rent so due until after he has demanded it, but such demand may be made at any time making the quarter; and the landlord is not bound, after making the demand, to wait a reasonable time before distraining, when the goods of the tenant are seized and about to be sold under a bill of sale: *London & W. L. & D. Co. v. London & W. W. R. Co.* [1893] 2 Q. B. 49; 62 L. J. Q. B. 370.

Distress for rent payable in advance: See Article 58.

The habendum in a lease was “for and during and unto the full end and term of ten years, to be computed from the 1st day of January, 1863, and from thence next ensuing.” The reddendum was for payment to the lessor of “the clear yearly rent or sum of \$720, without any deduction whatsoever, the first payment to begin and be made on the 1st day of January, 1863, next ensuing from the date of these presents.” The lease was dated the 27th of September, 1862, and it was held that the second year’s rent became due and payable on the 1st day of January,

1864, the rent being in fact payable in advance: *Joslin v. Jefferson* (1865) 14 U. C. C. P. 260.

When a lease is dated 1st of October, 1857, to hold for five years from the date thereof, "yielding and paying therefor on every 1st day of October during the said term" a certain rent, the rent will not be payable in advance, because terms last during the whole anniversary of the day from which they are granted. In other words, the last day of the first year of this term would be the 1st of October, 1858, and the legal intendment, in the absence of any express stipulation to the contrary, is that the rent reserved, being payable annually, would not be payable until the end of each year: *McCallum v. Snyder* (1860) 10 U. C. C. P. 191; see, however, *Sidebotham v. Holland* [1895] 1 Q. B. 378; [C. A.]; 11. T. L. R. 154. On the 2nd of September, 1872, a lease was made for five years from the 1st of October, 1872, at the yearly rent of \$230, payable "on the 1st day of October of each year in each and every year" during the continuance of the term; the first payment of \$200 to be made on the 31st of December, 1872, in advance, the balance of said year's rent, amounting to \$30, to be paid at the same time that the payment of 1873 is to be made." It was held that the rent for the second year was not payable in advance, for the reddendum required a payment "in each and every year," and this construction would not admit of payments in each year: *Brown v. Blackwell* (1874) 35 U. C. R. 239.

#### WHERE RENT IS PAYABLE.

ARTICLE 40.—Rent reserved payable yearly or otherwise is to be paid on the land because the land is the debtor, and that is the place of payment appointed by law.

[Authorities: Co. Lit. 201b; *Rowe v. Young* (1820), 2 Brod. & B. 234; Shep. Touch. 378; *Crouche v. Fastolfe*, (1681) Sir T. Raym. 418].



This, however, which is a rule of the common law, applies principally to forfeitures and conditions; for a covenant for the payment of rent, no particular place of payment being mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid and pay or tender him the money for the simple reason that he has contracted to do so: *Haldane v. Johnson* (1853) 8 Exch. 689.

See also *Beveridge v. Potter and Kent*, noted at p. 331, *post*, as to the *situs* of the rent debt.

### ABATEMENT OF RENT.

ARTICLE 41.—Where there is no statute or stipulation to the contrary, a lessee is not, so long as the term continues, entitled to any suspension or abatement of his rent except in cases of eviction—and this even though the buildings on the premises become unfit for use or habitation or are destroyed by fire.

Deductions from rent are dealt with in Article 42.

By an agreement between the town and the company the town gave the company a five years' option to purchase land leased to it for that period for manufacturing purposes—an annual rental was to be paid at the end of the term if the purchase was not completed, or *pro rata* at any earlier period at which the option was relinquished. Before the expiration of the five years, the company sold some of its machinery and was preparing to sell the balance when the corporation distrained for rent due under the agreement, and the contents of the factory were seized and sold. It was held that as the company had not relinquished the option, there was no rent due and that the distress was illegal. *Town of Cobourg v. Cyclone Woven Wire Fence Company* (1918) 44, D. L. R. 35, 57 S. C. R. 289. See also *Fox v. Slaughter* (1919) 35 T. L. R. 668.

Rent may be increased in proportion to the amount spent by the owner in improvements: *Dennison v. Kennedy* (1859) 7 Grant 342; or reduced in the event of prompt payment.

By an instrument under seal the payment may be varied, or the lessee relieved. By an indorsement under seal upon a lease of premises, it was agreed between landlord and tenant that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased, but that if the agreement became void by reason of the non-fulfilment of its terms before or at the time of payment of the second instalment, that the lease was to be and remain in full force and effect, and in case of the lease being cancelled no rent to be paid after 3rd February, 1863, the date of the agreement of purchase. Under the lease the rent was payable in advance, and at the date of the agreement to purchase a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid under the agreement, and the interest also, according to the tenant's evidence; but according to the landlord's it was not paid at the time, though he admitted that he had agreed to allow it to stand for some months afterwards. It was held that by the memorandum indorsed on the lease the rent under it, payable in advance, was not to be paid in case the lease was cancelled, and that the lease was cancelled in accordance with the agreement by the payment of the second instalment of purchase money. It was also held that the landlord could not recover the quarter's rent which fell due on 1st February, as this was either satisfied by the agreement and payment of money on the 3rd February, when the first instalment was paid, or to be considered by the indorsement on the lease as abandoned with all other rent, whether accruing due before or afterwards: *Forge v. Reynolds*, (1868) 18 U. C. C. P. 110.

The option is with the lessor to take the increased rent and waive the forfeiture where the lease prohibits

the carrying on of certain trades, and provides for an increased rent in consequence with a right of re-entry. The lessee is not entitled to pay the increased rent and carry on the prohibited business: *Weston v. Metropolitan* (1882), 9 Q. B. D. 404; 51 L. J. (Q. B.) 399 [C.A.]; and where there is an absolute covenant to do a certain act, with a proviso for the reduction of the rent if that act is performed, the lessee is not entitled to abstain from doing it by payment of the rent in full: *Hanbury v. Cundy* (1887), 58 L. T. 155; *Kinsman v. Jackson* (1880), 42 L. T. 80, 558.

In *Bell v. Quagliotti* (1920), 26 B. C. R. 482 [C.A.], it appeared that B, living in England, gave a fifteen-year lease of a property in Victoria to Q at a monthly rental of \$500 a month. Two years later B's agents, acting under power of attorney, reduced the rent to \$100 a month, reserving to B the right, as soon as conditions improved, to demand a higher rent. After accepting \$100 a month for nine months the agents gave Q notice that B would expect payment of rent in accordance with the terms of the lease, and after two months' rent was not paid B sued and obtained judgment for the rent in full and for possession of the property. It was held that the arrangement between B's agent and Q was one which could be terminated by the agent without any decision by B personally as to whether or not conditions had improved. And see *Western Transfer Co. v. Fry* (1920), 55 D. L. R. 291 [Alta.—App. Div.].

### *No Stipulation to the Contrary.*

There may, of course, be such a stipulation. For example, it is clear that a lease may provide for the cesser of the term and all further liability in respect of rent from the day of the destruction of the premises by fire: *Agar v. Stokes* (1881) 5 A. R. 180; *Cornock v. Dodds* (1872) 32 U. C. R. 625; *Saner v. Bilton* (1878) 7 Ch. D. 815; *Evans v. Skelton* (1889) 16 S. C. R. 637.

The lease of a mill site may provide for a suspension of the rent if the water fails: *Philips v. St. John Water Co.* (1858) 9 N. B. R. 24; *Beach v. The King*, *post*, p. 292.

An ordinary provision relieving from rent in the event of fire applies only to future rent: *Ryerse v. Lyons* (1863) 22 U. C. R. 12.

### *The Statutory Provisions.*

Where leases are made under the Short Forms Acts the provisions of the Statute, as to destruction by fire, discussed at p. 1102, *post*, apply.

Covenants to insure are dealt with at p. 621, *post*.

See The Public Health Act: p. 23, *ante*.

### *Destruction by Fire of Demised Premises.*

Where there is no statute or stipulation to the contrary, a lessee *who has entered into a covenant to repair* must pay rent though the premises be destroyed by fire: *Belfour v. Weston* (1786) 1 T. R. 310; *Baker v. Holtzapffel* (1811) 4 Taunt. 45; *Holtzapffel v. Baker*, (1816), 18 Ves. 118; *Izon v. Gorton* (1839) 5 Bing. N. C. 501; *Parker v. Gibbons* (1841), 1 Q. B. 421; *Lofft v. Dennis* (1859) 1 E. & E. 474.

This is so even though the landlord has insured the premises and received the insurance money without restoring the premises: *Leeds v. Cheetham* (1827) 1 Sim. 146.

The liability of the lessee in the event of fire proceeds on the ground that the land is the thing demised: *Baker v. Holtzapffel* (*supra*).

### *Examples of Such Stipulations.*

A lease provided that the term thereby created should cease on the destruction of the premises by fire, and the lessor should become liable to refund to the lessee, such part of the rent paid in advance as on a just apportionment should be found due. On the premises being destroyed, the lessee sued and recovered judgment for \$137.50 unearned rent; and it was held that by this act he had elected to put an end to the tenancy, and his

subsequent continuance in possession could not be under the lease, though it might be according to the terms thereof so far as applicable: *Taylor v. Hortop* (1873), 33 U. C. R. 462; (1872) 22 U. C. C. P. 542; *Hortop v. Taylor* (1871) 21 U. C. C. P. 56.

A lease of a mill and ten acres of land adjoining for five years at the rent of \$500 for the first year and \$550 for each of the four succeeding years, payable half yearly in advance, contained the usual covenants and provisions, amongst which was a covenant to pay rent without any exception as to fire, and to keep in repair, accidents by fire excepted, and the lease concluded with the following clause: "should the mill be rendered incapable by any fire or tempest, then the portion of rent for the unexpired portion of the term paid for in advance to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term. It was held that the effect of the whole instrument was that the destruction of the premises by fire did not merely give a right to a return of a proportionate part of the current half year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half year succeeding such destruction: *Agar v. Stokes* (1881) 5 A. R. 180.

On the 30th December, 1867, T. became lessee of two mills, called the Oatmeal Mill and the Erin New Mill, for ten years at \$1,000 per annum, payable half-yearly in advance on the 15th June and December, with a covenant for re-entry on non-payment, and a proviso that if the oatmeal mill was burned there should be a reduction of \$400 per annum, and if the new mill was burned a reduction of \$600 per annum, and if both were destroyed the term should cease, and only the proportion of rent due at the time of the destruction be paid. The new mill was burned on the 30th of October, the rent up to the 15th of December of that year having been paid in advance; it was held that the lessee was not entitled to the reduction of \$600 a year for the period from the 30th of October to the 15th of December as there was no stipula-

tion to that effect in the lease; the return being only in case of the destruction of both mills: *Cornock v. Dodds* (1872) 32 U. C. R. 625.

A lease provided that if the premises were destroyed by fire "a fair reduction and allowance shall be made in the rent, to be ascertained and computed by two indifferent arbitrators," one to be appointed by the lessor and the other by the lessee. This was held a substantive agreement for a reduction, and neither party having referred the matter to arbitration, the lessor brought an action for the whole rent; and it was held that the jury might make the reduction in consequence of fire: *McGill v. Proudfoot* (1847) 4 U. C. R. 33; see also *Hortop v. Taylor* (1871) 21 U. C. C. P. 56.

A. leased to B. a certain house and premises for fifteen years, and during the currency of the term, by agreement entered into between A. & C., reciting that B. had agreed to assign his interest to C., therein assented to such assignment, and further agreed that C. should have the option to purchase the fee within one year from date at a given sum, payable by instalments. At the time of the agreement C. paid to A. £50, to be on account of purchase money in case he elected to purchase, otherwise to be absorbed in rent. There was a proviso in the original lease to B., that in the event of the house being burnt the rent should cease. C. declared no intention to purchase, and the premises were afterwards destroyed by fire, at which time, long before the expiration of the lease, the rent amounted to £12 10s.; and it was held that C. was not entitled to recover the difference between the £50 paid and the rent due at the time of the fire; that A. was entitled to rent until the £50 was absorbed, for it could not be said that the consideration had entirely failed: *Pulver v. Williams* (1853) 3 U. C. C. P. 56.

There was a lease of all the room and power in a mill except a portion of the premises in which the machinery stood, and the lessors agreed to put in steam pipes, find certain machinery, and put the place in tenantable repair, and that the engine should be run regularly a cer-

tain number of hours a week. The payment was to commence in proportion to the amount of machinery running, but there was no stipulation for deduction in the event of failure to supply the steam power. On the premises being burnt down it was held that the payments were rent: see *Selby v. Greaves* [*ante*, p. 256]; and that the tenant was liable for the same after the fire: *Marshall v. Schofield* (1882) 52 L. J. Q. B. 58; 47 L. T. 406; 31 W. R. 134 (C. A.).

*What is the Rule where the Demised Premises are Rooms in a Building Destroyed?*

We have already seen [p. 288, *ante*] that the liability of the lessee proceeds on the ground that the land is the thing demised; but if the upper storey or a flat be rented, with no covenant to re-build by either landlord or tenant, will a fire in destroying the thing demised relieve from the rent?

The destruction of buildings upon land demised would seem to be a case merely of "sterility. The destruction of an upper flat in such a case is one of total destruction of the subject matter within the meaning of Lord Chelmsford's remarks quoted at p. 296, *post*.

*Instances of Other Express Stipulations.*

*Hessey v. Quinn* (1909), 18 O. L. R. 487, 13 O. W. R. 907 [Riddell, J.], a lease containing a proviso for a reasonable reduction in rent in the event of prohibition of sale of intoxicating liquors, was considered. And see the same case in the notes to Articles 52 and 73 (*post*), where the right to distrain pending a reference to reduce the rent was held not to be interfered with [20 O. L. R. 442: Osler, J.A.].

The appeal from the Master's report is reported in (1911) 2 O. W. N. 1505, 19 O. W. R. 901, on the question of evidence being given as to the amount of depreciation in value.

*Beach v. The King* (1906), 37 S. C. R. 259, 26 C. L. T. 246 [S. Ct. Can.], 9 Ex. Ct. R. 287, 25 Occ. N. 83, was the case of an abatement being provided for in a lease of water power from a canal.

A lease of a theatre provided for a suspension of rent if the theatre were "closed by order of any superior authority." This provision was held to apply where the theatre had been so damaged by the falling wall of an adjacent building that an order for its repair had been made by a magistrate and it was closed to enable the repairs to be made: *Lennox v. Curzon* (1906) 22 T. L. R. 611; 26 C. L. T. 570.

A lease contained a proviso that in case the premises should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent should cease or abate so long as the premises should continue unfit for occupation. It was held that the words "inevitable accident" imported something *ejusdem generis* with those previously mentioned, and did not entitle the lessee to an abatement while the lessor was in possession doing repairs, which had become necessary from the imperfect construction of the building: *Saner v. Bilton* (1878) 7 Ch. D. 815; 47 L. J. Ch. 267; *Manchester B. W. Co. (Ltd.) v. Carr* (1880) 5 C. P. D. 507.

There was a lease of certain land at a yearly rent of 15s. and the taxes, so that said taxes should not exceed £10 a year; any sum above that to be paid by the lessor; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbitration in case of dispute. The Grand Trunk Railway gave notice to the lessor that they required a portion of the land, which he conveyed to them after an arbitration as to the price. It was held that the land taken by the railway was sold by the lessor within the meaning of the lease, and that the abatement of the rent should not be measured by the interest on the money paid by the railway company, but should be determined by a jury upon a consideration of



the comparative value to the tenant of the land sold, assuming that the lease fixed the average value per acre. It was also held that there was no ground for claiming any abatement from the taxes on account of the sale: *Bickle v. Beatty* (1859) 17 U. C. R. 465.

The lessor of a tavern at a rent of \$400 a year, payable quarterly, agreed "to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed and for some years previously was \$85; but in the following year it was raised to \$200; it was held that the lessee could claim no allowance beyond the amount of the first quarter's rent, the lessor being bound to allow the fee only, provided it did not exceed such rent: *Writt v. Sharman* (1880) 41 U. C. R. 249.

Where a lessee agrees with the lessor to make certain improvements upon the demised premises and the former is "to get the first three years' rent for said buildings and improvements, provided that they are completed in the first two years," the rent will be suspended during the two years, and the lessor cannot before the expiration thereof eject for non-payment: *Irwin v. Hunter* (1869) 19 U. C. C. P. 391.

In *Acorn v. Hill* (1901) 34 N. S. R. 508, provision was made for an abatement of the rent where the house to be erected was not completed when the term began.

### *Demised Premises Becoming Uninhabitable.*

In *Denison v. Nation* (1862) 21 U. C. R. 57, Robinson, C.J., said: "The law is now fully settled by the case of *Hart v. Windsor* [see p. 572], that the fact of premises demised having become unfit for occupation by reason of want of repair or from defective drainage or from a nuisance existing on the premises, will not exempt the tenant from payment of rent if from any such cause he shall quit possession of the premises." In that case the house became unfit for habitation in consequence of the roof admitting water and for want of sufficient drainage.

This case was followed in *Harrod v. Watt* (1905) 1 W. L. R. 216 [N. W. T.—Newlands, J.] where the premises became uninhabitable because of flood.

It is to be observed that the rule as to an implied warranty of fitness of a furnished house only implies a warranty of fitness as to condition at the commencement of the term. See p. 570, *post*. If at the time of commencement the nuisance is serious the tenant is not bound to fulfil his contract or pay rent, and the landlord has no right to repair: *Wilson v. Finch-Hatton* and other cases noted at p. 571, *post*. This is not really a case of the premises becoming unfit, but of being unfit at the commencement of the term.

In *Scott v. Parade* (1919) 15 O. W. N. 441 [App. Div.] a tenant who abandoned premises on account of want of repair was held liable for the rent up to the time of re-letting.

See, also, *Cyclone, etc., Co. v. Canada, etc., Co., Ltd.* (1920) 18 O. W. N. 103; 19 O. W. N. 161 [App. Div. Rose, J.].

#### *Failure of Consideration for the Covenant.*

“The tenant’s obligation to pay rent stands unless it can be shown against the landlord that he has failed to do something that he has undertaken and so disabled himself from enforcing the obligation.” Per Davies, J., in *Vancouver Breweries, Ltd., v. Dana* (1915) 52 S. C. R. 134 [at p. 137] 9 W. W. R. 1018.

The question rose in this case when through the failure of a lessor to meet new license regulations as to enlargement of an hotel building on the demised premises the tenant was refused a renewal of his hotel license. The tenant argued that the fact that the lease was of an hotel property and that the lessor covenanted to make repairs and improvements gave rise to an implied condition to the effect that the obligation of the tenant to pay the rent reserved should terminate when the renewal license was refused through no fault of the lessees.

The Supreme Court held, affirming the Court of Appeal for British Columbia (1915) 21 B. C. R. 19, that there was no such implied condition and it could not be said that there was a total failure of consideration for the tenant's covenant to pay rent, following *Grimsdick v. Sweetman* [1909] 2 K. B. 740.

Duff, J., said, at p. 141: "It may be assumed that the parties did contract, both of them, in the expectation that the premises would continue to be licensed to the end of the term, but that is not a sufficient ground upon which to rest the implication of a condition such as that suggested. I find it impossible myself to say that the lessor and the lessee, if they had contemplated the possibility of the license being cancelled during the term, must necessarily, as reasonable business men, have made such a condition a part of their contract. Having regard to the decisions in analogous questions as between lessor and lessee, I think I cannot say that judicially; *e.g.*, *Paradine v. Jane* (1647) Aleyn 26." [See p. 634, *post*].

He then considered the so-called "Coronation Cases," *Krell v. Henry* [1903] 2 K. B. 740; *Chandler v. Webster* [1904] 1 K. B. 493, and *Herne Bay Steamboat Co. v. Hutton* [1903] 2 K. B. 683, in which the principle of *Taylor v. Caldwell* (1863) 3 B. & S. 826, *post*, p. 296, and *Appleby v. Meyers* (1867) L. R. 2 C. P. 651, were applied, and said: "This principle is not sufficient for the appellants because it cannot be contended that the license is essential to the performance of the contract. The principle has not hitherto, however, been applied in the case of a demise of land under which possession has been taken and a term has become vested in the tenant." And see per Anglin, J., at p. 143, as to the "Coronation Cases."

A tenant who has been induced by misrepresentation to enter into a lease and affirms the lease by bringing an action for damages must pay his rent and a counterclaim for rent was allowed in such a case: *Johnstone v. Hall* (1894) 10 M. R. 161.

In *Cherrier and Orton v. McCreight* [1917] 2 W. W. R. 8; 11 Alta. L. R. 270; 33 D. L. R. 689 [App. Div.] the

Court held, following *Grimsdick v. Sweetman and Vancouver, etc., v. Dana* (*ante*), and affirming the judgment of Harvey, C.J. [1917], 1 W. N. R. 834; 33 D. L. R. 689; that upon the construction of the lease of licensed premises the abolition of the bar was a risk that fell upon the lessee and quoted Lord Chelmsford's words in *Gowan v. Christie* L. R. 2 H. L. Sc. 273—"where there is a total destruction or exhaustion of the subject matter of a lease, then the lessee is entitled to abandon it. But I am not aware that where it is a case of sterility merely, the tenant has any such right."

*The Principle in Taylor v. Caldwell (ante).*

"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either expressed or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

The Ontario Temperance Act of 1916 [6 Geo. V. c. 50] enables a tenant of hotel premises whose license was taken away to obtain from the Board of License Commis-

sioners leave to terminate his lease. In *National Trust Co. v. Hannan* (1918) 15 O. W. N. 54 [Meredith, J.], it was held that a voluntary reduction of rent by the landlord did not raise an implied agreement by the tenant not to apply: the lease subsisted: it would have been otherwise if a new lease has been substituted, as it would not be within the Act.

### *So Long as the Term Continues.*

Where there is no surrender of the lease the tenant continues liable: *Findlayson v. Elliott* (1874) 21 Gr. 325. And it seems that there can be no surrender without the consent of the landlord: see *Nixon v. Maltby* (1882) 7 A. R. 371, and the cases noted at p. 299, *post*.

Termination of Term: see Article 107, *post*.

### *Eviction—by the Landlord.*

“Where a landlord evicts his tenant in the legal sense of that term, from any part of the premises demised, or where any one else does so by his authority, or under a title derived from him, the rent is suspended as to the whole premises so long as the eviction continues. *Per* Robinson, C.J., in *Carey v. Bostwick* (1852) 10 U. C. R. 156.

As to Eviction by Title Paramount, see p. 302, *post*.

### *Eviction Defined.*

An eviction may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord *with the intention* of depriving the tenant of the enjoyment of the whole or of a portion of the demised premises. Therefore, the question of eviction or no eviction depends on the circumstances, and is in all cases to be decided by the jury: *per* Jervis, C.J., in *Salmon v. Smith*, (1669) 1 Wm. Saund. 209 (*f*), quoted by Patterson, J., in *Ferguson v. Troop* (*post*), p. 577, where it was held

that the lessee had impliedly consented to the landlord remaining in possession after a period originally agreed upon and that there was no eviction. Ritchie, C.J., and Strong, J., dissented.

See also *Fitzgerald v. Mandas* (1910), 21 O. L. R. 312 (at 314), 16 O. W. R. 425; 1 O. W. N. 878 [Riddell, J.].

As to eviction as a breach of the covenant for quiet enjoyment see pp. 304 and 541 (*post*).

### *Cases where no Eviction.*

On the 1st of April, 1857, certain lands were by the widow of the owner in fee leased by the year, one-third of the yearly crop to be paid as rental. On the 17th April, 1860, the lands were sold by the Court to one D., who paid his deposit and signed the auctioneer's memorandum of purchase. The lessee afterwards agreed with D. to deliver him one-third of the wheat, and D. then entered into possession and converted the wheat to his own use, which facts the lessee set up as an answer to the claim for rent. It was held that D., being only an inchoate purchaser, was not entitled to the crop, and therefore the lessee could not resist payment of the rent, either on the ground of eviction or the necessity of attorning to D., as having title paramount: *Richardson v. Trinder* (1861) 11 U. C. C. P. 130.

The eviction to relieve a tenant from payment of his rent must be from the premises or some part thereof. Where the tenant is allowed for a time to pass over adjoining land belonging to a stranger, the withdrawal by the latter of that privilege does not amount to an eviction: *Shuttleworth v. Shaw* (1849) 6 U. C. R. 517.

It is no eviction to make a second lease expressly subject to the existing lease, nor will there be an eviction relieving the lessee from payment of rent if a person not authorized by the lessor erects a building on part of the premises: *R. v. Miller* (1883) 16 N. S. R. 361.

Where a landlord rented the outside of the fence around the premises to one C. to post bills on, but the

tenant claiming the fence C. posted no bills, and only put up a notice forbidding others to post bills without his leave, which notice was pulled down, it was held no eviction: *Oliver v. Mowat* (1873) 34 U. C. R. 472.

A tenant liable for rent to 1st May quit possession prior to that date, and handed the keys to his agent to be delivered to the lessor on 1st May. The incoming tenant obtained the keys by order from the lessor, and spent about ten days in the premises during April cleaning the house and making it fit for occupation, but the landlord did not authorize him to take possession before 1st May, and this was held no eviction: *Corse v. Moon* (1890) 22 N. S. R. 191.

Under a lease for three years the lessee had harvested the crops, and they with the barn were destroyed by fire. On receiving the insurance money the lessee left the farm without paying rent. The lessor then entered, ploughed and put in a crop of fall wheat, and afterwards applied on several occasions to the lessee for the rent, when the latter said he had no money, and it was held that this did not amount to an eviction: *Nixon v. Maltby* (1882) 7 A. R. 371.

Where a mortgagee, whose security was prior to a lease, brought ejectment against the tenant, who thereupon gave up possession, it was held that this amounted to an eviction at the date of the writ, and the rent was apportionable: *Barnes v. Bellamy* (1881) 44 U. C. R. 303; see also *Boulton v. Blake* (1886) 12 O. R. 532; *Kinnear v. Aspden* (1892) 19 A. R. 468.

Where the lessee is deprived of the use of an easement appurtenant to the demised premises, he is still liable for the rent. Thus where the demise was of a factory in which there was a water wheel, and the lease gave "the right to draw water from the mill pond adjoining the premises for driving said water wheel and machinery driven thereby," it was held no answer to an action for breach of the covenant to pay rent and repair that a third person claiming by title paramount had hindered and prevented the lessee from using the water so demised,

even though the premises were thereby rendered of no value to the lessee: for the right to draw water as aforesaid was an easement only, and not part of the demised premises. But in such case the lessee has an action on an implied covenant for failure to supply the water power, but after paying rent for some years and putting it out of his power to replace matters in the condition in which they were at the date of the lease, the lessee cannot insist on its cancellation: *Coleman v. Reddick* (1875) 25 U. C. C. P. 579.

The plaintiffs employed their landlord, the defendant, to sub-let the demised premises for them. The defendant desiring to repair adjoining premises moved the tenant into part of the plaintiffs' premises for which he agreed to pay a small rent and also to allow a "to let" notice to remain up and to show the premises to prospective sub-tenants. Held, no eviction even though the acts were done without the plaintiffs' knowledge: *Upton v. Townend*; *Newby v. Sharpe*; *Ferguson v. Troop*, followed: *Mickleborough v. Strathy* (1910) 21 O. L. R. 259; 16 O. W. R. 265 [Teetzel, J.]. On appeal to a Divisional Court the plaintiffs' case was not rested on eviction (see argument, p. 35), but on surrender by operation of law (see p. 683), *post* (1911) 23 O. L. R. 33; 2 O. W. N. 37; 18 O. W. R. 206 [Div. Ct.], and on the question of eviction Riddell, J., mentioned *Ball v. Carlin* (1908) 11 O. W. R. 814: see p. 301, *post*.

A temporary trespass by a landlord unaccompanied by any intention to put an end to the tenancy is not an eviction. There must be an expulsion and keeping out of possession until after the rent becomes due. Premises were let for the purpose of storing cartridges, and a statute subsequently passed made this illegal. The lessor, to avoid a seizure of the cartridges, removed them to another building, and then informed the lessee that the premises were still at his disposal for the same purpose, but if the cartridges were placed there he, the lessor, must, to protect himself from liability, inform the inspector, and it was held that there was no eviction: *Newby v. Sharpe* (1878) 8 Ch. D. 39; 47 L. J. Ch. 617 [C. A.].



In *Mah Po v. McCarthy* (1909) 10 W. L. R. 670; 2 Sask. L. R. 119 [Newlands, J.—Ct. in B.], it was held that depriving the lessee of possession while making necessary repairs was not an eviction: *Newby v. Sharpe* (*supra*), considered.

An entry made by the landlord for the purpose of protecting the demised premises, which had been left vacant by the tenant, did not amount to an eviction, the intention not being to put an end to the tenancy: *Newby v. Sharpe* (*supra*); *Oastler v. Henderson* (1877) 2 Q. B. D. 577; *Harrod v. Watt* (1905) 1 W. L. R. 216; 25 C. L. T. 297 [N. W. T.—Newlands, J.].

“I can find no semblance of authority for the proposition that the service of a notice to quit and demand of possession can in law amount to an eviction—and *a fortiori* the mere delivery of a warrant of distress to a bailiff is not”: per Riddell, J., in *Ball v. Carlin* (1908) 11 O. W. R. 814, at p. 816.

### *The Effect of Eviction by the Landlord.*

The eviction suspends the entire rent while it lasts: *Carey v. Bostwick* (*supra*); *Ferguson v. Troop* (*supra*), and in 25 N. B. R. 440; (1889) 28 N. B. R. 301.

In an action of covenant between the original parties to the deed, an eviction from a part of the premises is a good defence to the action, for there can be no apportionment of the rent as in debt: *Shuttleworth v. Shaw* (1849) 6 U. C. R. 539; and the Apportionment Act [see Art. 45] does not apply to a wrongful eviction: *Clapham v. Draper* (1885) C. & E. 484.

Where a right of action for rent is vested in the lessor by the same coming due, nothing which subsequently occurs to the premises can affect it. Thus a wrongful eviction or the burning of the property, and consequent cesser of rent by the terms of the lease, will not relieve the lessee from payment of rent which became due before these events happened: *Ryerse v. Lyons* (1863) 22 U. C. R. 12; unless, of course, a contrary intention be shown in the lease: see *Agar v. Stokes* (1881) 5 A. R. 180.

An eviction by the landlord from part of the demised premises confers no right on the tenant to abandon the residue of the premises, and, notwithstanding such partial eviction, the tenant is liable for all breaches of covenant excepting for non-payment of rent: *Morrison v. Chadwick* (1849) 7 C. B. 266.

For cases of eviction by title paramount, see p. 320, *post*.

### *Eviction by Title Paramount.*

In *Clary v. Lake Superior Corporation* (1906) 11 O. W. R. 381 [Mulock, C.J., Ex. D.] 12 O. W. R. 6 [Div. Ct.]; Mulock, C.J., said (p. 382): "It is competent to a lessee to shew that since the lease the lessor's title has come to an end, but that fact without more would not, I think, release the lessee from liability to pay rent. The lessee must go further and shew eviction by title paramount." He then discussed *Mountnoy v. Collier* (1853) 1 E. & B. 638; *Delaney v. Fox* (1856), 2 C. B. N. S. 766; *Carpenter v. Parker* (1857), 3 C. B. N. S. 206, and continued p. 384: "These cases go to shew that the law has been assumed to be that the lessee continues liable to pay the rent unless he be evicted or be liable to pay to the owner of the paramount title for use and occupation of the demised premises." The Chief Justice then pointed out that if the rule were otherwise a tenant would be obliged to ascertain, before making each payment of rent, whether his landlord still owned the demised premises.

Discoverers of mining lands applied for and became entitled to a lease, but their application was cancelled owing to their delay in completing. In the meantime and while they had the right to take possession they leased for 10 years to the defendant, who did not take possession, but paid rent. Four years later the locatees received their lease from the Crown for 10 years from its date. In an action against the defendant for rent it was held there had been no eviction by title paramount: *Clary v. Lake Superior, etc., Co.* (*supra*).

Mulock, C.J., said, at p. 382: "The word eviction, formerly used to denote actual expulsion, has come to have a modified meaning, and now it may be held to mean the tenant's loss of the right to enjoy the demised premises as tenant of his landlord: *Upton v. Greenlees* (1855) 17 C. B. 63, as where the owner of paramount title, having the right to eject the tenant in possession, threatens to exercise such right unless the tenant attorns to him. In such case, if the tenant, in order to be entitled to retain possession, agrees to hold under such owner, there has been expulsion in law in respect of the tenant's original enjoyment under the lease and such expulsion would relieve him of liability to his original landlord: *Mayor, etc., of Poole v. Whitt* (1846) 15 M. & W. 576."

The lessee is discharged from the payment of rent from the time of the eviction; but must pay the rent which came due before; the enjoyment of the land is the consideration for which the tenant agrees to pay the rent: see Gilbert on Rents, p. 145, referred to in *Clary v. Lake Superior Corporation*, at p. 383.

A requisition of premises by the War Office was held not to be an eviction by title paramount and the tenant was held liable for the rent during the occupation by the War Office. It was also held that the doctrine of frustration of adventure was not applicable to a contract which created and vested a term in the tenant: *London and Northern Estates Co. v. Kish-Schlesinger* [1916], 1 K. B. 20; 85 L. J. (K.B.) 369 referred to; *Whitehall Court (Ltd.) v. Ettlinger* [1920] 1 K. B. 680; 89 L. J. (K.B.) 126; 41 C. L. T. 429.

A tenant who has gone into possession of the demised premises cannot set up as a defence to a claim for rent a failure on the part of his landlord to make repairs agreed upon or a trespass by the landlord even to the extent of depriving the tenant of the enjoyment of a portion of the demised premises unaccompanied by any intention to evict and put an end to the tenancy: *Gordon v. Sime* (1917) 44 N. B. R. 535; 37 D. L. R. 386.

*Breaches of the Covenant for Quiet Enjoyment.*

A breach of the covenant for quiet enjoyment, although entitling a tenant to damages, does not necessarily work a suspension of the rent, even although the damage to be allowed would at least equal the amount of the rent; the act of the landlord must amount to an eviction in law: per Lamont, J., delivering the judgment of the Full Court in *Mah Po v. McCarthy* (1909) 10 W. L. R. 670; 2 Sask. L. R. 119; 29 C. L. T. 868, and considering *Budd-Scott v. Daniel* [1902] 2 K. B. 351; *Ferguson v. Troop* (1889) 17 S. C. R. 527 (N. B.), and *Upton v. Townend* (1855) 17 C. B. 30, but see Redman, 6th Edn. (1912), 243, citing *Morrison v. Chadwick* (1849) 7 C. B. 266; *Newton v. Allin* (1841) 1 Q. B. 519.

The refusal of a lessor to make repairs in the case of structural defects [see pp. 315 and 550, *post*], was held to be a breach of the covenant for quiet enjoyment and tantamount to an eviction, so that the lessor was not entitled to rent after the day upon which the lessee left: *Buttimer v. Bettz* (1914) 26 W. L. R. 705 [B.C.—Grant, Co.J.].

In *Walton v. Biggs* (1912) 19 W. L. R. 895 [Man.—Patterson, Co. J.], the daily and continual use of sewing machines and the thumping of pressing irons used in a dressmaker's business in the plaintiff's apartment house, in the flat above that rented by the defendant from the plaintiff, was held to be a nuisance, and a breach of the covenant for quiet enjoyment, which justified the defendant in leaving the premises, and disentitled the plaintiff to recover the amount which the defendant had agreed to pay as rent for the unexpired portion of his term.

After entry the lessee is liable for the rent, even though disturbed in the enjoyment. A lease of certain premises on the Bay Shore, in front of the City of Toronto, contained no covenant for quiet enjoyment. The Corporation in the construction of the Esplanade, under the authority of an Act of Parliament, cut off the access to the water, which had been granted by the lease, and the Court held that this did not relieve the lessee from the

payment of the rent. In this case there was no eviction from any part, but the character and nature of the premises were changed. If the act were tortious, the lessee would have a remedy against the city. If rightful by reason of title derived from the lessors or because they had title paramount, the lessee might sue on the implied covenants of the lessors for quiet enjoyment; but in neither of these cases, if he continued to occupy, could he relieve himself from fulfilling his own contract: *Lyman v. Snarr* (1861) 9 U. C. C. P. 104; see also *Richardson v. Trinder* (1861) 11 U. C. C. P. 130.

### DEDUCTIONS FROM RENT.

ARTICLE 42.—A tenant may deduct from his rent next accruing due, any taxes paid by him which, as between him and his landlord, the latter ought to pay: and frequently by agreement between the parties the tenant is permitted to make other deductions from his rent; in addition, he has various statutory rights of deduction in some provinces.

#### *Payment of Taxes.*

In Ontario as between the parties to a lease the lessor pays taxes when the lease is silent on the subject: *Dove v. Dove* (1868) 18 U. C. C. P. 424. *Semi-Ready, Limited, v. Tew* (1909) 19 O. L. R. 227, [Div. Ct.] at p. 232 [Boyd. C.].

The law seems to be clear that where a landlord is liable to any rate or tax, which the tenant has paid, under actual or implied compulsion, the latter may deduct the amount from his rent, unless there is an *express covenant or stipulation to the contrary*: *Payne v. Burridge* (1844) 12 M. & W. 727, and the Statutes noted, p. 306, *post*.

Municipal lands are exempted from taxation only when occupied for the purposes of the municipality or unoccupied; when occupied by a tenant they are taxable and the tax is a tenant's tax payable by the tenant and

not in any event payable by the landlord, as between it and the tenant. R. S. O. 1914 c. 195, s. 5 (7). [The Assessment Act]: *Canadian Pacific Railway Co. and Toronto* (1902) 4 O. L. R. 134; 1 O. W. R. 255; 22 C. L. T. 235 [Div. Ct.], (1903) 5 O. L. R. 717; 2 O. W. R. 385 and sec. 97 (*infra*) does not apply [*Id.*].

In Ontario in 1850, 14-15 V. c. 67, s. 7, was passed providing that "any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner [or previous occupant] unless there be a special agreement between the occupant and the owner to the contrary."

This provision was re-enacted in 1853 by 16 Vict. c. 182, s. 7, and appeared, with the words in brackets, in R. S. O. 1897, c. 224, s. 26.

This Act would, no doubt, give the tenant the right to deduct taxes where the lease is silent as to the liability therefor as between the parties: see *Dove v. Dove* (*ante*), for in such case the landlord is liable; and a *fortiori* the tenant may deduct the taxes when the lease expressly requires the former to pay. The Act seems to entitle the occupant to deduct taxes from rent when they could have been collected from him. He cannot pay merely because the taxes could be recovered from the owner unless they could also be recovered from him (the occupant), nor is the occupant justified in paying unless there be a legal right to collect from him by distress: *Carson v. Veitch* (1885) 9 O. R. 706.

In *Meehan v. Pears* (1899) 30 O. R. 433 [Div. Ct.] a tenant who had been in possession in 1897 as owner and in 1898 leased from the mortgagee in possession, was not allowed to deduct the taxes for 1897 from the rent for 1898, even though he had been the previous occupant, as he was himself primarily liable. Meredith, C.J., said, at p. 437: "The section must, we think, necessarily be read as referring to taxes for which the tenant is not himself the primary debtor."

A lessee from a municipal corporation under a lease in perpetuity was not allowed to take advantage of this

section in *Canadian Pacific R. W. Co. v. City of Toronto* (1902) 4 O. L. R. 135 [Boyd, C.], where it was held that the section only applied to taxes which could legally be recovered from the owner and no other.

In *Fitzgerald v. Mandas* (1910) 21 O. L. R. 312, Riddell, J., said: "It is true there is no express covenant by the landlord . . . to pay taxes; but there is none by the tenant. In such a case in England, following the rule of the Poor Relief Act of 1610, the taxes are payable by the tenant; in Ontario the rule is different, in consequence of the provision introduced in 1850 . . ." And he referred to *Dove v. Dove* (*ante*).

As to the English rule see the argument of E. D. Armour, K.C., in *C. P. R. v. Toronto* (*ante*), at pp. 139, 140.

In 1904 by 4 Edw. VII., c. 23, s. 92, the section was put into the following abbreviated form:

"Any tenant may deduct from his rent any taxes paid by him which as between him and his landlord the latter ought to pay," and so it passed into the Assessment Act, R. S. O. 1914, c. 195, s. 97.

In speaking of this section Boyd, C., in *Rochfort v. Brown* (1911) 25 O. L. R. 206 [Div. Ct.], after referring to *Dove v. Dove*, at p. 210: "The owner is primarily liable; and, if the tenant is called on to pay taxes, he pays only *sub modo*, for he can deduct the payment out of his rent or otherwise be recouped by his landlord."

The plaintiff, a tenant, sought to restrain the defendant municipality from realizing under distress for taxes. As it was not clear that the tenant should not pay the taxes an injunction was refused. *Campbell v. Wallaceburg [Town]* (1908), 12 O. W. R. 697, 29 C. L. T. 925. See also *Canadian Canning Co. v. Fagan* (1906) 12 B. C. R. 23; 3 W. L. R. 38.

In *Tyrrell v. Verrall* (1915) 8 O. W. N. 114; 35 C. L. T. 340 [App. Div.], the covenant by two lessees was to pay rent, water rates, gas and electric light rates: the reddendum was in the statutory form with the words "without any deduction, defalcation or abatement whatsoever" added. There was no covenant to pay taxes.

The Court did not think it necessary to decide the question, but stated that it was not prepared to assent to the argument that the effect of the words of the *reddendum* in its expanded form with the superadded words quoted above, was to exclude the right to deduct taxes—especially as the lease contained an express covenant to pay certain rates which would seem to exclude liability to pay other rates.

The covenant to pay taxes was omitted in error, so far as one of the lessees was concerned; the other claimed not to know that it was intended. The former lessee paid taxes until he assigned his interest to the latter.

Meredith, C.J. O., said, at p. 116: "If it be the proper conclusion that as between the appellant and Matthews the appellant became liable to pay the taxes, and, of course, if the result of the transactions was that the appellant came under that obligation to the respondent, the appellant is not entitled to deduct the taxes from the rent. The statutory right of a tenant to deduct the taxes paid by him from his rent exists only where as between the landlord and the tenant the landlord ought to pay them, and in the circumstances of this case it cannot be said that as between his tenants and the respondent the latter ought to have paid the taxes. If the circumstances I have mentioned were absent, and the questions were to be determined on the terms of the lease and the evidence as to the omission of a provision that the tenant should pay the taxes, I am of the opinion that the appellant would fail. Matthews and he were the tenants under the lease, not the appellant alone, and where there are more tenants than one it is in my opinion sufficient to exclude the operation of the statute that as between one of them and the landlord that one ought to pay the taxes; in other words, that in such a case, applying the Interpretation Act, the section which gives the right to deduct the taxes applies only where none of the tenants is liable, but the landlord is liable to pay the taxes. A further difficulty in the way of the appellant's success is the fact that he did not pay the taxes of 1913, but they were, as I have said, paid by Jones and Ward."



*Similar Statutory Provisions.*

Manitoba: R. S. M. 1913, c. 134, s. 139. Alberta: In Alberta the Towns Act (1911-2) cap. 2, s. 309, provides that no distress shall be made upon the goods or chattels of a tenant for any taxes not originally assessed against him as such tenant. See also The Village Act (1913) 1 Sess. c. 5, s. 124.

It would seem the taxes must actually be paid by the tenant before he can deduct them from the rent: *Ryan v. Thompson* (1868) L. R. 3 C. P. 144.

*Voluntary Payments.*

T. entered under a written agreement for a lease which was silent as to who should pay the taxes, but at the time of signing he verbally agreed to pay them. No lease was ever executed, and T., having occupied for four years, paid taxes for three years, and then attempted to set them off against the rent; but it was held that, having made the payments voluntarily, even if without consideration, he could not set them off or recover back the sums so paid: *McAnnany v. Tickell* (1864) 23 U. C. R. 499.

When there is no valid demand of the taxes there is no right to distrain, and therefore no right to deduct the taxes from the rent: *Carson v. Veitch* (*supra*), following *Chamberlain v. Turner* (1881) 31 U. C. C. P. 490; see also *Goldie v. Johns* (1889), 16 A. R. 129.

A payment by a person liable to a distress, or to an ejectment, in case of non-payment, and who pays the amount on demand, or upon the expiration of time allowed for such payment, is not a voluntary payment: *Carter v. Carter* (1829) 5 Bing. 409.

Certain leased premises drained into a ravine, and the City of Toronto closed up this ravine and thereby occasioned an accumulation of water on the premises, rendering a drain into the common sewer necessary. The tenant, who was liable to pay taxes, drained the premises into the sewer and paid the sewerage rate, and it was held

that the payment was voluntary and could not be set off against the rent: *Aldwell v. Hanath* (1857) 7 U. C. C. P. 9.

*From what Rent the Deduction Should be Made.*

The deduction should be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period: *Andrew v. Hancock*, (1819), 1 B. & B. 37; 3 Moo. 278; *Cumming v. Bedborough* (1846), 15 M. & W. 438.

Where a tenant has voluntarily paid his full rent without deducting a landlord's tax for a considerable time, he can neither recover it back nor plead it as a payment in replevin: *Denby v. Moore* (1817), 1 B. & Ald. 123; and see *McAnnany v. Tickell* (*supra*). and *Hill v. Kirshenstein* (1920), 89 L. J. K. B. 1128 [C.A.] and *Beaufort [Duke] v. Inland Revenue Com'rs.* [1913], 3 K. B. 48; 82 L. J. K. B. 865.

Under an agreement outside of a lease the lessee was to do some ditching on the land which was to be allowed him as a payment on account of the rent. The ditching was done during the summer, and the lessor afterwards issued a distress warrant for half a year's rent due on the 1st of May previously, which rent the lessee paid; it was held that the amount of work was entirely within the knowledge of the latter, and as he had not given the lessor any account of it before the distress, he had no means of crediting it on the rent, and that the lessee could not maintain an action to recover back the value of the ditching: *Graham v. Gilbert* (1873) 14 N. B. R. 239.

On the authority of *Stubbs v. Parsons* (1820), 3 B. & Ald. 516, it has been held that under the Act the taxes must be deducted from the rent due or accruing due at the time the taxes are paid. After paying taxes for several years without deducting them from the rent due during those years, the deduction cannot all be made out of the last year's rent, whatever other rights the tenant may have in respect of the payment of taxes for which the landlord is liable: *Wade v. Thompson* (1862) 8 C. L. J.

(O. S.) 22 [Co. Ct. Essex]; and see the cases noted at p. 269, *ante*.

### *The Remedy by Action.*

Where a tenant has paid a tax which his landlord is bound to pay, he may recover the amount by action: *Smith v. Franklin* (1892) 12 C. L. T. 414; 28 C. L. J. 543; R. S. M. 1913, c. 134, s. 139. Where a tenant has paid his full rent without deduction under protest because of a threat of distress, he may recover by action the amount of rates and taxes which he has paid for his landlord: *Baker v. Greenhill* (1842) 3 Q. B. 148; 11 L. J. Q. B. 161; 2 G. & D. 435.

The occupant may bring an action against his landlord to recover damages sustained by reason of a distress for taxes upon the premises. But such damages are restricted to the amount of taxes paid to remove such distress and do not include consequential damages: *Smith v. Franklin* (*supra*).

### *The Express Covenant or Stipulation to the Contrary.*

The usual agreement is that the tenant will pay the rent reserved without any deduction (or abatement) whatsoever.

Leases made under the Short Forms Act contain such a provision in the *Extended* form: the Short Form reading merely "to pay rent": see p. 1101, *post*.

Leases made under the Land Titles or Real Property Acts contain an implied covenant to pay without deduction: see p. 162, *ante*.

A tenant who covenants to pay rent without deduction thereout for or by reason of any matter or thing whatsoever, cannot claim a deduction for the amount of taxes paid by him for the house and premises demised: *Grantham v. Elliott* (1842) 6 U. C. Q. B.; O. S. 192; and see *Payne v. BurrIDGE* (*ante*).

The author of an article in (1915) 35 C. L. T., p. 208, discussing this covenant and the early English cases along with *Grantham v. Elliott*, says at p. 211, "a line of cases

commencing over 120 years ago ending with a strong case which severely shook the authority of the only case affirming the contrary, establishes that this phrase is in effect a covenant to pay taxes; those taxes, that is, for which the tenant is in the first instance liable; and which in default of such an agreement he would as between himself and his landlord be entitled to deduct from the rent."

He then points out that the express covenant to pay taxes which usually follows—always in Short Forms and Land Titles leases—is unnecessary. This point is discussed at p. 1103, *post*; and see *Tyrrell v. Verrall* (*ante*, p. 307).

A landlord is bound to allow, by way of deduction from or discharge of rent due from the tenant, a payment of property tax made by a tenant to the Inland Revenue authorities, notwithstanding that the tenant refuses to show the landlord the collector's receipt for the taxes, but tells him he may call and see it at the office: *North London and General Property Co. v. Moy* [1918], 2 K. B. 439 [C.A.]; 38 C. L. T. 778; 87 L. J. K. B. 986.

In *Skinner v. Hunt* (1904) 20 T. L. R. 556; 24 C. L. T. 238 [C. A.] reversing 20 T. L. R. 176; 24 C. L. T. 75, a tenant who had covenanted with his landlord to pay all charges was compelled by the district board to pay the cost of paving the road. Held, that by this payment the rent *quâ* rent had not been paid, and that the landlord might distrain, and was not restricted to his remedy by action on the covenant.

#### *Other Statutes.*

Under the Public Health Act, R. S. O. (1914) c. 218, s. 82, all reasonable costs and expenses incurred in abating a nuisance are recoverable from both the owner and occupier for the time being of such premises, and such occupier may deduct any money recovered or collected from him which as between him and the owner, the latter ought to pay out of the rent from time to time becoming due in respect of the premises [s.-s. 4].

An occupier shall not be required to pay any further sum than the amount of rent for the time being due from him, or which, after demand of such costs or expenses, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuses truly to disclose the amount of his rent and the name and address of the person to whom the rent is payable, and the burden of proof that the sum demanded from such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier [s.-s. 5].

The Act was recast in the present form by 2 Geo. V. c. 58, s. 82.

Under the Act respecting Snow Fences, R. S. O., 1914, c. 211, s. 3 (2), when the owner or occupier refuses to take down, alter or remove a fence and construct other fences as required by the Council, and the latter incurs expense in consequence, and the tenant is required to pay the same or any part thereof, he may deduct the same and any costs paid by him from the rent payable by him, or may otherwise recover the same unless he has agreed with the landlord to pay the same.

See the provisions of the Manitoba Real Property Act, p. 224, *ante*.

### *Deductions for Improvements.*

Where a landlord covenanted to allow the tenant all reasonable improvements made by him in the amount of his rent, it was held that the tenant could deduct the value of the improvements from the rent: *Wilcoxson v. Palmer* (1840) R. & J. Dig. 2057; see also *Wheeler v. Sime* (1846) 3 U. C. R. 143.

A lease was made of certain land at "the clear yearly rent of \$1.50 per acre of cleared land on 1st of February in each year, one-half in cash and one-half in work on said land in clearing and fencing as hereinafter mentioned," with a covenant for payment of taxes by the lessee, with liberty to deduct one-half exclusive of statute

labour from the rent, one-half from the money and one-half from the rent to be paid in labour. The lessee within the first year to make and put in the fences on said cleared land 2,000 rails, for which he was to be allowed out of said rent \$20, viz., \$10 out of the money rent and \$10 out of the labour rent, with the further agreement as to the rent to be paid in work, that the lessee should be allowed at the rate of \$13 per acre for the land which he should chop, log, clear, and fence, in payment of said rent. Then there was another clause, "that the portion of said lot now chopped but not cleared, and also the portion under contract with L. for chopping, shall be logged, cleared, and fenced, within two years from the date by the said lessee, who in return for his work on said portions of land shall have two crops therefrom free of rent, and shall afterwards pay the same rent per acre for said portions as for the land now cleared. It was held that there was nothing expressed in the lease to charge the tenant with rent for the land to be chopped, cleared, and brought into cultivation by him, nor could any such liability be implied: *Jones v. Montgomery* (1871) 21 U. C. C. P. 157.

R. leased to C. certain premises for eight years. C. covenanted that he would at his own charge place the land and premises in good order; that he would build a new stable and would repair and keep repaired the fences and gates then erected, or that might be erected during the term; and on account of these improvements and additions it was agreed that no rent should be paid for the first nine months; it was held, under the special circumstances of the case, that the lessee was not obliged to perform his covenant within the time for which he was relieved from rent: *Castle v. Rohan* (1851) 9 U. C. R. 400.

A lease was dated 15th of December, 1862, for five years at an annual rent, half payable on 1st of January and half on 1st of February following in each and every year during the term, with an agreement at the end that the first payment of rent should not become due until the

1st of January, 1864, and it was held that this agreement did not prevent any rent from falling due in 1863, but was limited to the first payment to be made on the 1st of January, 1863, or at most to the rent for the first year, and that two years' rent was therefore due before the 17th of November, 1864: *Huskinson v. Lawrence* (1866) 26 U. C. R. 570.

### *Deductions for Repairs.*

There is old authority for saying that where a landlord agrees to do repairs during the term, and makes default, at common law, the tenant may do them and deduct the cost from the rent.

It is unusual to find such a covenant on the part of the landlord and the whole subject is discussed in an article in the *London Law Times*, reprinted in (1906) 26 C. L. T., at pp. 681-683.

The above principle is laid down in *Beale v. Taylor* (1590) 1 Leon 237, and (*sub. nom. Taylor v. Beale*) 1 Cro. 522.

*Smith v. Mapleback* (1786) 1 T. R. 446, however, laid down the sweeping statement that instead "the lessor and lessee have their respective remedies on the several covenants contained in the lease"; and see *Tarrabain v. Ferring* [1917], 2 W. W. R. 381; 2 Alta. L. R. 47 [App. Div.], per Stuart, J., at p. 383.

The writer also points out that *Surplice v. Farnsworth* (1844) 13 L. J. C. P. 215, debarred the lessee from throwing up possession upon the lessor failing to repair according to covenant in the lease.

In *Buttimer v. Bettz* (1914) 26 W. L. R. 704 [B.C.—Grant, Co.J.], where by reason of structural defects in water closets the building has been declared a nuisance under the Public Health Act it was held that while the tenant might—notice having been given—make the repairs and charge them to his landlord [*Gibhardt v. Saunders* [1892] 2 Q. B. 452, referred to] he was not compelled to do so.

*Burgoyne v. Mallett* (1912) 21 W. L. R. 566; 5 D. L. R. 62 [B.C.—Grant, Co.J.], was a case of repairs being made, some at the request of the landlord, some without; the latter were not allowed to be deducted “as a discouragement to tenants in making repairs without request.”

In the case of slight repairs the tenant is justified, after notice of want of repair and a reasonable time elapses, to expend what is needed in making the repairs and charging it against his landlord or taking it out of the rent, provided, of course, the landlord has agreed to repair: see per Boyd, C., in *Brown v. Toronto Hospital Trustees* (1893) 23 O. R. 603.

But some notice of this kind would be necessary, for there is no implied stipulation that the tenant may repair (on neglect by the landlord) and deduct from the rent: *Howlet v. Strickland* (1774) 1 Cowp. 56; *Weigall v. Waters* (1795) 6 T. R. 488; *Smith v. Mapleback* (*supra*). But the lease may contain an express stipulation to that effect: *Johnson v. Carre* (1664) 1 Lev. 152; *Baylye v. Hughes* (1628), Cro. Car. 137; *Millmine v. Hart* (1847), 4 U. C. R. 525.

#### PAYMENT BY COMPULSION.

ARTICLE 43.—Payment of rent by compulsion to a person having a legal charge or incumbrance on the demised premises is in contemplation of law a payment to the landlord or owner of the property, subject to such charge or incumbrance, and who ought to pay the same.

[Authorities: *Infra*; *Passim*].

This is so with respect to payments of original ground-rent: *Sapsford v. Fletcher* (1792) 4 T. R. 511; *Carter v. Carter* (1829) 5 Bing. 406; *Jones v. Morris* (1849) 3 Exch. 742; or of an annuity or rent-charge with power of distress: *Taylor v. Zamira* (1816) 6 Taunt. 524; *Whitmore v. Walker* (1848) 2 C. & K. 615; or of the principal or interest due on a mortgage made prior to



the demise, and which the tenant has been compelled to pay under threat of an ejectment, or "to put the law in force," which means the same thing: *Pope v. Biggs* (1829) 9 B. & C. 245; 4 M. & R. 193; *Johnson v. Jones* (1839) 9 A. & E. 809; *Waddilove v Barnett* (1835), 2 Bing. N. C. 538. So payment to an eleigtit creditor who has acquired the legal reversion: *Sharp v. Key* (1841), 8 M. & W. 379; *Lloyd v. Davies* (1848) 2 Exch. 103. But in all these cases the payment must have been by compulsion, and not voluntary. A payment by a person liable to a distress or to an ejectment in case of non-payment, and who pays the amount on demand or upon the expiration of time allowed for such payment, is not a voluntary payment: *Carter v. Carter*, *supra*. Nevertheless, there must be evidence that the payment was made in consequence of a request, coupled with a threat in case of non-payment to distrain, or to eject, or to put the law in force: *Whitmore v. Walker* and *Taylor v. Zamira*, *supra*. When a party threatened with a distress for rent pays the money when he might have legally defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand: *Knibbs v. Hall*, (1794) 1 Esp. 84. Under an agreement outside of a lease the lessee was to do some ditching on the land which was to be allowed him as a payment on account of the rent. The ditching was done during the summer, and the lessor afterwards issued a distress warrant for half a year's rent on the 1st of May previously, which rent the lessee paid; it was held that the amount of work was entirely within the knowledge of the latter, and as he had not given the lessor any account of it before the distress, he had no means of crediting it on the rent, and that the lessee could not maintain an action to recover back the value of the ditching: *Graham v. Gilbert* (1873) 14 N. B. R. 239. Certain leased premises drained into a ravine, and the City of Toronto closed up this ravine and thereby occasioned an accumulation of water on the premises, rendering a drain into the common sewer necessary. The tenant, who was liable to pay taxes, drained the premises

into the sewer and paid the sewerage rate, and it was held that the payment was voluntary and could not be set off against the rent: *Aldwell v. Hanath* (1857) 7 U. C. C. P. 9.

B. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises, subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure them the purchase money thereof. On the 1st February the defendant took possession of the premises under a verbal agreement with P. that the latter should assign the lease to him, and it was so assigned on the 4th of June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but they remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage, but on the same day before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff then sued the defendant to recover the amount paid. It was held that there being no privity of contract or estate between the defendant and plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shown to have been liable for, and that the plaintiff's payment was voluntary so far as concerned the defendant, and he could not recover: *Herring v. Wilson* (1885) 4 O. R. 607; see *Edmunds v. Wallingford* (1885) 14 Q. B. D. 811 [C.A.].

### APPORTIONMENT OF RENT.

ARTICLE 44. — Rent is apportionable in respect of estate at common law; but is only apportionable in respect of time by virtue of statutes passed in that behalf.

### *Apportionment in Respect of Estate.*

Rent reserved on a lease is by common law incident to the reversion and passes with it on every devolution or alienation, that is future rent: *Wittrock v. Hallinan* (1855) 13 U. C. R. 135; Co. Lit. 148 (a).

Where there has been a severance of the term the lessor may sue the assignee of part of the premises for the rent due in respect of that part: *Gamon v. Vernon* (1679) 2 Lev. 231; *Stevenson v. Lambard* (1802) 2 East. 575. He recovers against the assignee on the privity of estate, and the rent is apportionable, though in an action of debt between lessor and lessee it is not.

Apportionment of rent by the common law takes place either by act of law or by act of the parties: Co. Lit. 148(a), and see *Hartley v. Maddocks* [1899] 2 Ch. 199.

It should be observed that the Apportionment Acts [*post*, p. 322], made no apportionment in respect of estate which is still at common law: *Reeve v. Thompson* (1887) 14 O. R. 499.

### *By Act of Law.*

By act of law, where lands demised at an entire rent become divided among different persons (thus, if freehold and leasehold premises are let together at one rent), an apportionment takes place at the death of the lessor among the real and personal representatives: *Hare v. Proudfoot* (1838) 6 U. C. Q. B. O. S. 617.

### *By Act of the Parties.*

Apportionment at common law may also be by act of the parties: thus if the lessor dispose of the reversion in part of the lands, either by deed or by will, the rent is apportionable: *West v. Lassels* (1601) Cro. Eliz. 851; *Collins Case* (1597) 13 Co. R. 57a; Cro. Eliz. 606, 622; Moor, 644; *Swansea Corporation v. Thomas* (1882) 10 Q. B. D. 48; *Mitchell v. McCauley* (1893) 20 A. R. 272;

(1891) 11 C. L. T. 325; *Reeve v. Thompson* (1887) 14 O. R. 499.

*Surrender of Part by the Lessee.*

When the lessee surrenders part of the land to the lessor, the rent for the remainder is apportioned: *Smith v. Malings* (1607) Cro. Jac. 160; Co. Lit. 148.

*Eviction by Title Paramount.*

Where the lessee is evicted from part of the lands by title paramount, he will have to pay a ratable proportion for the remainder: *Smith v. Malings* (1607) Cro. Jac. 160; Co. Lit. 148(a); *Stevenson v. Lambard* (1802) 2 East. 575.

*Eviction by Lessor.*

But if he be evicted from part of the lands by his lessor or his assigns, no apportionment but a suspension of the whole rent takes place: *Morrison v. Chadwick* (1849) 7 C. B. 266; *Hartley v. Maddocks* (1899) 47 W. R. 573, and see Article 41, p. 285 (*ante*).

Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment can be made for the goods, as the rent is held to issue from the land alone: *Emott v. Cole* (1591) Cro. Eliz. 255. But where the mortgagor of a house let it furnished, and the tenant after notice paid the whole rent to the mortgagee, it was held that the mortgagor might still recover for the use of the furniture: *Salmon v. Matthews* (1841) 8 M. & W. 827; and where A. demised to B. certain mines for thirty years, with license to use an adjoining railway in common with A., and during the term A. prevented B. from using the railway, it was held that this created no suspension of the rent because it issued out of the thing demised, namely, out of the mines, etc., and not out of the easement to use the railway: *Williams v. Hayward* (1859) 1 E. & E. 1040; 28 L. J. (Q.B.) 374; *Coleman v. Reddick* (1875) 25 U. C. C. P. 579.

*Consent of Lessee or Concurrence of Jury.*

Where, after leasing several parcels of land, the lessor conveys away one of them, there is a severance of the reversion, and the rent is apportionable at common law, but the concurrence of the lessee is necessary or apportionment by a jury: *Bliss v. Collins* (1822) 5 B. & Ald. 876.

But where after the conveyance the assignee of the reversion leased to the lessor at a yearly rent of 20 cents the land which the latter had previously leased to hold during the term of such lease, and the lessee continued to pay rent as before to the lessor and was not called on to attorn to the assignee, and was informed by the lessor that he would not be disturbed while rent was paid, it was held that the concurrence of the lessee in the apportionment might be assumed: *Reeve v. Thompson* (1887) 14 O. R. 499.

Where a lessor conveys a part of the reversion to A. and another part to B., the rent may be apportioned by consent of parties, and the fact of the lessee having on one occasion made separate arrangements with A. for the payment of his proportion of it will be sufficient evidence of the lessee's consent to the apportionment made by his lessors: *Mitchell v. McCauley* (1893) 20 A. R. 272 (1891); 11 C. L. T. 325.

As to apportionment of a rent seck, see *McCaskill v. McCaskill* (1886) 12 O. R. 783. The case of *Rector St. Ann's v. Bacon* (1864) 11 N. B. R. 134, is clearly erroneous in view of all the authorities, though on a mere sale purporting to effect a severance of the reversion, there is no appointment of rent until the conveyance is made: *Moberly v. Cor. Collingwood* (1895) 25 O. R. 625.

The lessee of land under a lease for years containing the usual lessee's covenant to pay rent assigned all her interest in the term. Subsequently the lessor granted the reversion in part of the demised premises. No rent having been paid by the assignees of the lessee, the lessor

sued for arrears of rent accrued due since the grant of the reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part the reversion of which remained in the lessor, and it was held that the covenant to pay rent was divisible and that the rent could be apportioned, though the action was founded on privity of contract only: *Swansea Corporation v. Thomas* (1882) 10 Q. B. D. 48. The right of suing in such case exists at common law. The 32 Hen. VIII. c. 34, [see p. 1083, *post*], gives the assignee of the reversion the same right of suing the lessee as the original reversioner had, and the statute transfers to the assignee the privity of contract and the covenant is divisible: *Id.*; *Boulton v. Blake* (1886) 12 O. R. 532.

Where there is a demise at one entire rent of lands of which the lessor is seized in fee, and lands of which he is tenant for life with power of leasing, if the lease is void as to the latter the rent may be apportioned for the remainder: *Doe d. Vaughan v. Meyler* (1814) 2 M. & S. 276. Where the lessor professes to grant more than he is entitled to as an exclusive right of sporting, and he has no such privilege, an apportionment of rent will be made on that account: *Tomlinson v. Day* (1821) 2 Brod. & B. 680; 5 Moore 558. Where a lease not under seal is void as to part of the land by reason of a prior lease covering such part for the whole term, the rent is not apportionable, this not being analogous to an eviction by title paramount: *Neale v. MacKenzie* (1837) 1 M. & W. 747; *Carey v. Bostwick* (1852) 10 U. C. R. 156.

#### *Apportionment in Respect of Time.*

At common law rent neither accrued due nor was payable, except on the day on which it was reserved; interest, on the other hand, although it might be payable at a specified date, was considered to accrue from day to day.

#### *The Statute.*

The Distress for Rent Act [(1737) 11 Geo. II. c. 19, s. 15 (Imp.)], after reciting “that where any lessor or land-

lord, having only an estate for life in the lands, tenements or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same"; enacted, "that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, etc., if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively."

No apportionment of rent takes place as between the heir and personal representative of a tenant in fee, but the heir is entitled to the whole rent: *Re Clulow* (1857) 3 K. & J. 689; 26 L. J. (Ch.) 513. It will be observed that the statute only applies when the tenancy determines on the death of the tenant for life: see *Cattley v. Arnold* (1859) 1 Johns. & H. 651; 28 L. J. (Ch.) 352.

The operation of this Act was by the Apportionment Act (1834) 4 & 5 Wm. IV. c. 22, extended to all cases where leases were determined by the lessor although not strictly tenant for life and in cases of leases by tenant for life was given a wider application.

An equitable tenant for life under a settlement of freehold leases for lives obtained a renewed grant for

lives to himself. At his death the property was in the occupation of yearly tenants under parol demises by him, and it was held that the rents were not apportionable under the 4 & 5 Wm. IV. c. 22, because the demises were not in writing; nor under the 11 Geo. II. c. 19, because they did not determine on the death of the tenant for life: *Mills v. Trumper* (1869) L. R. 4 Ch. 320; 20 L. T. 384; 17 W. R. 428.

The Imperial Apportionment Act of 1870 [33 & 34 Vict. c. 35, s. 2], enacts "That from and after the passing of this Act, all rents, annuities, dividends," etc., shall be apportionable.

"Prior to this Act rent neither accrued due nor was payable, except on the day on which it was reserved, whereas interest accrued *de die in diem*, although it might be payable at certain specified days. The effect of the Act is that rent, like interest, accrues from day to day; and that the payments of rent, like the payments of interest, when they are periodical, shall be apportioned in respect of the time at which the rent, like the interest, accrued due": *Re South Kensington Stores* (1881) 17 Ch. D. 165 [Fry, J.].

This Act practically superseded the previous Acts, such as 11 Geo. II. c. 19, s. 15 [Imp.], although they were not repealed: 1 Encyc. Laws of England, 426.

### *Similar Legislation.*

British Columbia: R. S. B. C. (1911) c. 126, s. 11, and see ss. 12, 13 and 14.

New Brunswick: C. S. N. B. 1903, c. 152 [Property Act] contains similar provisions. Sec. 4 corresponding to s. 4 of the Ontario Act; s. 5 to s. 5; s. 6 to s. 6; s. 7 to s. 2; s. 8 to s. 7.

Nova Scotia: R. S. N. S. 1900, c. 150 [The Apportionment Act], s. 2 corresponds to s. 2 of the Ontario Act; s. 3 to s. 4; s. 4 to s. 5; s. 5 to s. 6; s. 6 to s. 7.

Ontario: The Apportionment Act, R. S. O. 1914, c. 156, s. 4, provides:



“All rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.”

“The Ontario Act is almost *totidem verbis*, and the changes suffered by it on revision are merely verbal,” Meredith, C.J.C.P., in *Holliday v. Bank of Hamilton* (1917) 40 O. L. R. 203 [App. Div.], at p. 206.

### *The Application of the Act.*

It does not apply to rent payable in advance, per Meredith, C.J.O., in *Re Little and Beattie* (1917) 38 O. L. R. 551 [App. Div.], at p. 555; 34 D. L. R. 217, referring to *Ellis v. Rowbotham* [1900] 1 Q. B. 740; 69 L. J. (Q. B.) 379, and *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, at 343; the reason being that it does not extend to sums properly paid before the happening of the incident which is said to necessitate the apportionment.

A lease provided that if any Act were passed preventing the sale of intoxicating liquors over the bar the rent should be determined by arbitration. Three months' rent became due *in advance* August 1st. The Ontario Temperance Act came into force September 16th following. It was held the Apportionment Act did not apply: *Re Little and Beattie* (*supra*).

It applies when the lease is assigned to a trustee in bankruptcy: *Swansea Bank v. Thomas* (1879) 4 Ex. D. 94; 48 L. J. (Ex.) 344; 40 L. T. 558; 27 W. R. 491; *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92.

Also when the lease is determined by “re-entry, death, or otherwise”: R. S. O. (1914) c. 156, s. 5, which seems to include the case of a surrender or re-entry for forfeiture.

The Act does not contemplate any alteration in the time of payment as between landlord and tenant. It was passed to divide between the persons who, by reason of death, assignment or other devolution of interest, became

entitled to different portions of accruing rent: *Re United Club and Hotel Co.* (1889) 60 L. T. 665; and when the case remains strictly between landlord and tenant, the latter can only be called upon to pay the amount named on the day stated under his contract. It is when other interests intervene that the apportionment becomes necessary.

It was held, in *Miller v. Nicholls* (1903); 23 Occ. N. 176 [(N. S.) Townsend, J.], that the Nova Scotia Act has no application as between vendor and purchaser, following *In re Richard Dawson* (1888) L. R. Ir. 21 Ch. 441, and that consequently the purchaser in the absence of any reservation was entitled to all rents accruing from the property after he became the owner—in this case when the contract to purchase was closed.

Where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived, it was held that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order, but not to the rent for the whole of the unexpired month or quarter: *Massie v. Toronto Printing Co.* (1887) 12 P. R. 12.

It would seem, however, that the Act has altered the law in the event of a removal of his goods by a tenant in order to avoid the payment of his rent. Formerly the removal was not fraudulent unless the day appointed for payment of the rent had arrived. But it is conceived this is now otherwise.

The parties may “contract out” of the Act: see ss. 6, 7 (Ontario); 8 (New Brunswick); 6 (Nova Scotia); also *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337; *Re Meredith: Stone v. Meredith* (1898) 67 L. J. (Ch.) 409.

The Act not only apportions rights but liabilities as well: *Re Howell* [1895] 1 Q. B. 844; *Re Wilson* (1893) 62 L. J. (Q. B.) 628; *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92. Thus, where the residue of a term under a lease became vested in the trustee of the lessee, who was

a liquidating debtor, and the trustee assigned over during the current quarter, it was held that he was liable for a proportionate part of the rent up to the time of the assignment: *Swansea Bank v. Thomas* (1879) 4 Ex. D. 94. This decision will, of course, apply to all cases of terms transferred in the middle of a current rental period. But for the statute, the holder of the term when the rent fell due would be liable for the full amount. Now, in respect of every assignee or lessee, the rent is to be considered as accruing from day to day while the term is vested in him.

Where a tenant for life who had made a lease died between gale days the half year's rent paid to his executor was held to be apportionable in his hands between the parties entitled: *Dennis v. Hoover* (1896) 27 O. R. 377.

### *In Cases of Re-entry.*

At common law rent accruing is forfeited by re-entry before the gale-day: *Hall v. Burgess* (1826) 5 B. & C. 332; 18 Hals. 480, 486.

"But, . . . the better opinion seems to be that the Apportionment Act has changed this result: so that the rent is held to be payable *de die in diem*, and so apportionable as to the broken period," per Boyd, C., in *Crozier v. Trevarton* (*infra*), discussing *Foa* (1914) pp. 117, 118, and 18 Hals. 480, note (*h*)—(1911).

Although it has not been expressly decided that the Act applies to cases of forfeiture, it seems clear on its terms, and apportionment has been made when the lease was ended without any fault or breach of covenant by the lessee: *Kinnear v. Aspden* (1892) 19 A. R. 468.

A tenant occupying under a lease for 10 years from the 25th October, 1906, rent falling due 1st November and 1st May, abandoned the premises in October, 1908, having paid the rent which fell due on 1st November, 1907, and 1st May, 1908. It was held on the facts there had been an eviction [see p. 683], but that the landlord was entitled to recover rent down to the date of the eviction—by virtue of the Apportionment Act, following

*Hartcup & Co. v. Bell* (1883) Cab. & El. 19, and *Elvidge v. Meldon* (1888) 24 L. R. Ir. 91; *Crozier v. Trevarton* (1914) 32 O. L. R. 79 [Boyd, C.]; 7 O. W. N. 111; 22 D. L. R. 199.

*Rent Payable by Virtue of Acceleration Clauses.*

In *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, a lease dated 28th November, 1887, for five years from the 1st of February, 1888, of certain premises, at a yearly rental of \$370, payable quarterly in advance, contained a provision that if the lessee should make any assignment for the benefit of creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. The lessee, on the 16th of July, 1888, made an assignment for the benefit of creditors, and the assignee went into possession of the premises, and so remained until the 1st of September, 1888. On the 24th of July, 1888, the lessor distrained for and was paid by the assignee \$270, the balance of the current year's rent, up to 1st February, 1888, which had originally been payable \$85 on 1st May, 1888, \$92.50 on 1st August and \$92.50 on the 1st November, 1888. It was declared the Apportionment Act had no application and that the landlord had the right to distrain for the \$270.

This decision is discussed by Magee, J.A., in *Alderson v. Watson* (1916) 35 O. L. R. [App. Div.], at 579, 580, and see his remarks at p. 583, where he is discussing s. 38 of the Landlord and Tenant Act.

Where a mortgagee, whose security was prior to a lease, brought ejectment against the tenant, it was held that the rent must be apportioned, and the lessee was only liable to the date of the writ, he then giving up possession: *Barnes v. Bellamy* (1881) 44 U. C. R. 303; *Boulton v. Blake* (1886) 12 O. R. 532; *Hartcup v. Bell* (1883) C. & E. 19. Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined between two gale days, the rent is

apportionable under the Act, and the tenant is liable to pay rent up to the day of such determination. This principle was applied in favour of a subsequent mortgagee, who gave notice of his mortgage and required a tenant to pay rent to him: *Kinnear v. Aspden* (1892) 19 A. R. 468.

*When the Apportioned Rent is Payable.*

When the rent continues, the apportioned part is payable when the entire portion of which such apportioned part forms part becomes due and payable, and not before.

Imp. Act s. 3: R. S. O. 1914, c. 156, s. 5; R. S. N. S. 1900, c. 150, s. 4; C. S. N. B. 1903, c. 152, s. 4.

*May Rent be Attached?*

“That *overdue rent* is a debt attachable is beyond question: *Mitchell v. Lee* (1867) L. R. 2 Q. B. 259,” per Riddell, J., in *Halliday v. Bank of Hamilton* (1917) 40 O. L. R. 203, at p. 205; 38 D. L. R. 128 [App. Div.].

Where overdue rent has been distrained for the landlord cannot sue for the debt [see Article 47] and, therefore, a creditor cannot attach that rent in the tenant's hands: *Hoyes v. Creery* [1918] 1 W. W. R. 873; 24 B. C. R. 505; 39 D. L. R. 516 [B.C.—C.A.].

Rent due from the Government of Manitoba may be attached: *Elliott v. Forrester* [1918] 2 W. W. R. 220 Man.—Macdonald, J.].

See also *Foulds v. Chambers* (1896) 11 M. R. 300, and *McDonald v. Sullivan* (1902) 5 O. L. R. 87; 23 Occ. N. 45.

As to mortgagees setting aside an order attaching rents due to the mortgagor, see *Parker v. McIlwain* (1895) 15 C. L. T. 236; 31 C. L. J. 428; 17 P. R. 84; 16 Occ. N. 39; *Reilly v. McDonald* (1902), 1 O. W. R. 721, 723, 784, 840, 849, 196.

“Equally well settled is it that before the Apportionment Acts” and still in provinces where those Acts

are not in force—"rent not yet due was not attachable: *McLaren v. Sudworth* (1858) 4 U. C. L. J. O. S. 233; *Commercial Bank v. Jarvis* (1859) 5 U. C. L. J. O. S. 66." See per Riddell, J., in *Halliday v. Bank of Hamilton* (*supra*), p. 205.

The question remains whether rent which as between the landlord and tenant is not yet due—or a *pro rata* part of it may be attached to answer a claim of a creditor.

"No decision, I think, goes further than to make the *pro rata* part of the rent attachable" in such cases: per Riddell, J., in *Halliday v. Bank of Hamilton*.

In *Massie v. Toronto Printing Co.* (1887) 12 P. R. 12, it was held that under the statute by which the rent is considered as accruing from day to day, and apportionable in respect of time accordingly, it may be attached to a debt accruing between gale days, and the judgment creditor is entitled to be paid on the gale day such portion as had accrued due on the day of service of the attachment [Dalton, M.C.—Galt, J.].

This was the opinion of the Court in *Birmingham v. Malone* (1896) 32 C. L. J. 717 [Dean, Co.C.J.]: *Patterson v. King* (1895) 27 O. R. 56; 16 Occ. N. 7 [Boyd, C.]; *Patterson v. Richmond* (1881) 17 C. L. J. 324 [Ardagh, Co.C.J.]; *Kirk v. Burgess* (1888) 15 O. R. 608.

The contrary opinion was held in *Barnett v. Eastman* (1898) 67 L. J. (N.S.) (Q.B.) 517 [Day, J.]; *Christie v. Casey* (1894) 31 C. L. J. 35 [Ketchum, Co.C.J.].

The various decisions were considered by Riddell, J., in *Halliday v. Bank of Hamilton* (*supra*), and he considered himself bound by *Barnett v. Eastman* (*supra*), with which he also concurred, and he held that the rent *pro rata* is not attachable.

Where rent has been attached before a distress for it has been made the right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment: *Patterson v. King* (1895) 27 O. R. 56; *Mitchell v. Lee* (1867) L. R. 2 Q. B. 259.

## CHAPTER VII.

### RECOVERY OF RENT BY ACTION.

ARTICLE 45.—*How Rent May be Recovered.*

Situs of the rent debt.

Limitation of actions.

Set off and counterclaim.

Effect of judgment.

Who may sue?

Use and occupation.

ARTICLE 46.—*The Tenant has all Day to Pay.*

ARTICLE 47.—*Distress Suspends the Right of Action.*

ARTICLE 48.—*Action for Balance Due after Distress Sold.*

### THE RECOVERY OF RENT.

ARTICLE 45.—Rent may be recovered by action or by the summary remedy of distress.

[Authorities: 18 Hals., ss. 965, 966].

The Right of Distress is dealt with in Articles 49 *et seq.*

A Fair Rents Act is now in force in Nova Scotia (1919), 9 Geo. V. c. 2.

#### *Recovery by Action.*

#### *The Situs of the Rent Debt.*

Rent accrued due for premises is situate in the province in which the premises are, upon the principle that debts are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced: *Beveridge v. Potter and Kent* [1917] 1 W. R. 702 [Alta.—Greene, D.C.J.] (holding that rent of a house in Alberta payable to a landlord domiciled in Pittsburg might be attached in Alberta).

*Limitation of Actions for Rent.*

By the 21 Jac. 1 (1623) c. 16, all actions for rent in arrear, grounded upon any lending or contract without specialty, must be brought within six years.

By the Ontario Limitations Act, R. S. O. 1914 [Part III.] s. 49 (1), "the following actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned:

(a) An action for rent, upon an indenture of demise . . . within six years after the cause of such action arose."

[Origin: R. S. O. 1887, c. 60, s. 1 (1a); R. S. O. 1897, c. 72, s. 1 (1a); (1910) 10 Edw. VII. c. 34, s. 49. Taken from Imperial Civil Procedure Act (1833) 3 & 4 Wm. IV. c. 42, s. 3].

*Similar Legislation.*

Alberta: C.O. c. 31, s. 1.

British Columbia: R. S. B. C. (1911), c. 145, s. 3.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 1 (e).

Saskatchewan: R. S. S. 1909, c. 50, s. 2.

By the Ontario Limitations Act, R. S. O. 1914, c. 75, s. 18 (1):—

"No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgement in writing of the same has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

[Origin: R. S. O. 1887, c. 111, s. 17, R. S. O. 1897, c. 133, s. 17; 1910, 10 Edw. VII. c. 34, s. 18. Taken from the Imperial Act (1833) 3-4 Wm. IV. c. 27, s. 42 [Real Property Limitation Act].



*Similar Legislation.**The English Act (supra).*

Alberta: see C.O. c. 31, s. 2.

British Columbia: R. S. B. C. (1911), c. 145, s. 50.

Manitoba: R. S. M. 1913, c. 116, s. 18.

New Brunswick: C. S. N. B. (1903) c. 138, s. 4.

Nova Scotia: R. S. N. S. 1900, c. 167, ss. 24-25.

Saskatchewan: R. S. S. 1909, c. 50, s. 1.

This section does not conflict with the provisions just considered [p. 332, *ante*]. The personal remedy on the covenant remains: *Sinclair v. Jackson* (1853) 17 Beav. 405; *Smith v. Hill* (1878) 9 Ch. D. 143; see also *Anderson v. Cunningham* (1889) 21 N. S. R. 344; *Mason v. Johnston* (1893), 20 A. R. 412; *McMahon v. Spencer* (1886) 13 A. R. 430; *Boice v. O'Loane* (1878) 3 A. R. 167; *Jay v. Johnstone* [1893] 1 Q. B. 189 [C.A.]; *Re England*; *Steward v. England* [1895] 2 Ch. 820 [C.A.]. Therefore, an action on the covenant for rent may be brought within twenty years, and is not limited to six years: *Paget v. Foley* (1836) 2 Bing. N. C. 679; *Hunter v. Nockolds* (1850) 1 Mac. & G. 640; *Strachan v. Thomas* (1840) 12 A. & E. 536; *Darley v. Tennant* (1885) 53 L. T. 257; and it is now well established that, so long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by non-payment for any length of time, though arrears for only six years are charged on the land: *Archbold v. Scully* (1861) 9 H. L. Cas. 360; 7 Jur. N. S. 1169; see also *Warren v. Murray* [1894] 2 Q. B. 648 [C. A.].

*Set-off and Counterclaim.*

In some provinces [see p. 413, *post*] a tenant is empowered by statute to set off against the rent due, a debt due to him by the landlord; and, where the provisions of the statute are complied with, the lessor can only distrain for the balance, and there seems no reason why the set-off when properly claimed should not be a

bar to an action for the rent against which the debt is set off.

A claim of the tenant against the landlord can, of course, be set up after action brought, by way of counterclaim under the provisions of the Judicature Act in force in the various provinces and in Nova Scotia, New Brunswick and Manitoba there may be a set-off whether the subject thereof sounds in damages or not. The various Judicature Acts are referred to at p. 106 (*ante*). The statute seems to apply before action and to enable the tenant to prevent a distress by serving the notice. The lessee cannot set off against the rent a claim for damages for breach by the lessor of covenants to repair and to lease an adjoining piece of land: *Walton v. Henry* (1889) 18 O. R. 620.

#### *Effect of Recovery of Judgment.*

In *Douglas v. Carrington* (1914) 7 W. W. R. 59 [Sask.—Elwood, J.], a landlord had recovered a judgment for rent under which the sheriff had removed the goods seized from the lands demised and sold them. It was held the landlord could not be permitted to claim the proceeds as rent so as to cut out claims for wages filed with the sheriff pursuant to The Creditor's Relief Act: R. S. S. 1909, c. 63. There was nothing in the sheriff's hands upon which a distress could be made.

#### *Who May Sue for the Rent?*

Although the lessor assign his reversion the assignor may sue on the covenant for the rent: *Hartley v. Jarvis* (1849) 7 U. C. R. 545, and see the cases noted at p. 366, *post*.

A mortgagee who has entered into possession and collected and received rents alone has the legal right to take them or bring an action for the rents due: *Morrison v. Jackson* (1901) 21 C. L. T. 85.

If rents are specifically assigned *qua* rents the assignee may distrain therefor, but an assignment of

"all the debts, accounts and moneys due or accruing due," etc., although such debts consist only of rent, is not sufficient to enable the assignee to distrain. Nor does the inclusion in the assignment of "all contracts, securities, bills, notes and other documents . . . in respect of the said debts . . ." have the effect of assigning the lease. A lease is not a security but merely a deed or instrument out of which rent rises. In view of such assignment the assignor was held not entitled to make distress for the rents in his own name for his own benefit. The claim that his seizure was made as agent for certain mortgagees was rejected on the evidence because it was for an amount greatly in excess of the mortgagees' claim for rent which dated only from the time when notice to attorn was given: *In re the Companies Winding-up Ordinance; In re Edmonton Law Stationers (In Liquidation)*, [1919] 2 W. W. R. 869 (Alta.); 48 D. L. R. 344, affirmed [1919] 3 W. W. R. 406, and see the cases collected at p. 1030, *post*.

Where a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot at once recover the whole rent for the unexpired portion of the term. He must either (1) consent to the tenant's departure and treat the term as surrendered or (2) treat the term as subsisting and sue for future gales as they come due: *Connolly v. Coon* (1896) 23 A. R. 37; 16 Occ. N. 45 [Ont.—C. A.]: and see p. 178.

"Rent in arrear and due reserved in a lease for a life or lives may be recovered by action in the same way as if reserved upon a lease for years"—R. S. N. S. (1900), c. 172, s. 19; C. S. N. B., 1903, c. 153, s. 25.

Reference should also be made to the statutes noted under Article 49 [p. 362, *post*], providing for rights of distress and actions for rent: particularly as to executors and administrators [p. 368]: mortgagors [p. 371]: and joint-tenants [p. 370].

*Use and Occupation.*

If the demise be not under seal rent is also recoverable in an action founded on use and occupation: 7 Ency. L. of E. 688.

In *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 [App. Div.]—also noted at pp. 196 and 199, Riddell, J. at p. 180, points out that one may be “in possession (1) under a lease, written or oral, express or implied—the feudal relation of landlord and tenant exists, the tenant must pay rent—or he may be in such possession (2) without a lease—the relationship of landlord and tenant does not exist, there is no rent payable as such, but the law implies a contract to pay the landlord a reasonable sum for the use and occupation of his land.”

*Why the Statute 11 Geo. II. was Passed.*

“When the common law was in all its glory, if a landlord sued in assumpsit for use and occupation, and it turned out there was a lease, he was non-suited—his action should have been in debt, or if lease was under seal, in covenant, not assumpsit: [Reference to *Reade v. Johnson* (1591) Cro. Eliz. 242, and *Clerk v. Palady* (1598) Cro. Eliz. 859]. To aid the landlord a statute was passed to get rid of this difficulty—one of the very many statutes to assist land owners . . .,” per Riddell, J., in *Young v. Bank of Nova Scotia*, p. 180.

It was passed to obviate doubts and difficulties in that form of action, wherein, if a demise at a certain rent was proved, the plaintiff was nonsuited or the judgment arrested: *Gibson v. Kirk* (1841) 1 Q. B. 850, where the history of this form of action is discussed.

*What the Statute Provides.*

By the Imperial Distress for Rent Act (1737) 11 Geo. II., c. 19, s. 14, “to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, it shall and may be lawful to

and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered."

*Similar Legislation.*

British Columbia: R. S. B. C. (1911), c. 126, s. 10.

New Brunswick: C. S. N. B. 1903, c. 153, s. 24.

Nova Scotia: R. S. N. S. 1900, c. 172, s. 17.

*The Remedy at Common Law.*

By the common law an action of debt for use and occupation was maintainable, even when there was a demise, not under seal, at a certain rent: *Gibson v. Kirk* (1841) 1 Q. B. 850.

In an action for use and occupation, the plaintiff is bound to prove a contract, express or implied, to pay compensation for the use and occupation: *Crawford v. Seney* (1888) 17 O. R. 74.

An action for use and occupation is founded on an implied agreement to pay for the use of the property, and the defendant must have held or occupied the premises as tenant to the plaintiff; or by his permission or sufferance: *Camden (Marquis) v. Batterbury* (1859) 5 C. B. N. S. 808; 7 C. B. N. S. 864; 28 L. J. (C. P.) 335.

In the absence of an express lease, or agreement for a lease at a fixed rent, when the premises have been used or occupied by the defendant, by the permission or sufferance of the plaintiff, the law will imply a contract or promise to pay to the plaintiff a reasonable sum for such use and occupation: *Hall v. Burgess* (1826) 5 B.

& C. 332; *Churchward v. Ford* (1857) 2 H. & N. 446; 26 L. J. (Ex.) 354. This is so notwithstanding there is a lease in writing containing a condition precedent which has not been performed by the plaintiff: *Smith v. Eldridge* (1854) 15 C. B. 236; *Smith v. Twoart* (1841) 2 M. & G. 841.

Where it does not appear that the plaintiff held himself out as landlord, or did anything to indicate that he claimed the land, or that the defendant held or enjoyed under the plaintiff, the action will not lie: *Thompson v. Bennett* (1867), 17 U. C. C. P. 380.

If there be a demise under seal, the plaintiff cannot sue for use and occupation: see the statute 11 Geo. II. c. 19, s. 14, noted at p. 336, *post*; *Beverley v. Lincoln Gas Light and Coke Co.* (1837) 6 Ad. & El. 829; *Gibson v. Kirk* (1841) 1 Q. B. 850; *Dungay v. Angove* (1794) 2 Ves. Jun. 307; *McFarlane v. Buchanan* (1862) 12 U. C. C. P. 591, but the fact that the agreement to lease is by deed will not prevent an action: *Elliott v. Thompson* (1801) 4 Esp. 59. And though a lease by deed be executed, still, if it is not delivered to operate as a lease, the action may still be maintained: *Gudgen v. Bessett* (1856) 6 E. & B. 986; 26 L. J. (Q. B.) 36.

There need not be an actual demise to support this action. A mere agreement for a lease, coupled with proof of *possession* thereunder, is sufficient: *Beverley v. Lincoln Gas Light and Coke Co.* (*supra*); *Hickman v. Machin* (1859) 4 H. & N. 716. An agreement for a lease, not amounting to an actual demise, coupled with *possession* thereunder, is sufficient, notwithstanding such agreement be under seal, for the tenancy is created by the entry with the plaintiff's permission, and not by the deed: *Elliott v. Rogers* (1801) 4 Esp. 59; *Camden (Marquis) v. Batterbury* (*supra*).

### *Circumstances from which an Agreement will be Implied.*

#### *Overholding Tenant.*

A tenant who holds over after the expiration or determination of his term by the sufferance of his land-

lord, but without any agreement for a new tenancy, or any payment of rent, is liable to an action for use and occupation: *Bayley v. Bradley* (1848) 5 C. B. 396; *Hellier v. Silcox* (1850) 19 L. J. (Q.B.) 295; *Seymour v. Graham* (1864) 23 U. C. R. 272; *McFarlane v. Buchanan* [*ante*, p. 338]; *Harding v. Crethorn* (1793) Esp. 57; although not to a distress for rent: *Alford v. Vickery* (1842), Car. & M. 280.

Where the plaintiff was entitled to a cottage after his mother's death, and the defendant had resided in it with the mother, rent free, till her death, and had since continued in possession, and had paid no rent, it was held that the plaintiff might recover, in an action for use and occupation, a reasonable compensation for the enjoyment subsequent to his mother's death: *Hellier v. Silcox*, *supra*.

Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term does not amount to any evidence of use and occupation, so as to make him liable for another quarter: *Gray v. Bompas* (1862) 11 C. B. N. S. 520.

It is the duty of a tenant, on the expiration of his term, to deliver up possession of the demised premises to his landlord, free from incumbrances created by the tenant. Therefore, if any under-tenant refuse to quit possession at the end of the term, the tenant will continue liable for use and occupation so long as his under-tenant holds over, but no longer: *Ibbs v. Richardson* (1839) 9 A. & E. 849, and see Article 126, p. 808, *post*.

Where premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use and occupation, so long as A. continues to occupy, but no longer: *Christy v. Tancred* (1840) 7 M. & W. 127; 9 M. & W. 438; 12 M. & W. 316.

Where upon the expiry of a parol lease for a term certain the lessees did not exercise an option they had

to renew for two years, but their sub-tenant continued in possession of part of the demised premises, the lessees were held liable for use and occupation, following *Harding v. Crethorn* (1793) 1 Esp. 57. It was also held that where the former lease was some evidence of the value of the premises such evidence might be rebutted: *Lindsay v. Robertson* (1899) 30 O. R. 229; 19 C. L. T. (Occ. N.) 71 [Div. Ct.].

The defendant, a foreign consul, was personally sued for use and occupation of certain rooms which had been used by him and his predecessor as the consulate office. When the defendant assumed office a lease from the plaintiff to the former consul was current, but was not assigned to the defendant. The rent had in fact been paid by the foreign Government through the former consul, and the lease had been submitted to the Government and approved by it; both to the knowledge of the plaintiff. The plaintiff did not demise or attempt to demise to the defendant. Held, that the defendant was not liable: *Duncombe v. Burke* (1900) 20 C. L. T. (Occ. N.) 241 (Ont.).

A lease contained covenants entitling the lessee to a new and further lease for a further term of 21 years, at a rental to be fixed by the award of three arbitrators, to be made before the expiration of the term.

Arbitrators were duly appointed, but an award was not made within the time limited, as proceedings against the Corporation of the City of Toronto for damages caused to the lands by the high level bridge across the Don were pending, and it was agreed by a formal document that the arbitration should stand till these proceedings should be ended, and the rights of the parties should not be prejudiced by this delay.

When the award was made, four years after the original term had expired, the rental was increased from \$200 per annum to \$1,400 per annum; the tenant in each case paying the taxes.

The defendant, who had been in possession all this time, thought this award excessive and refused to pay or to renew.



In an action for use and occupation or rent the Appellate Division, Meredith, C.J.C.P., said (47 D. L. R. 328);

“From whichever point of view this case is looked upon, the plaintiffs are entitled to judgment against the defendant for, at the least, the sum which has been awarded them. The defendant, having been in possession, and in receipt of the rents and profits, of the land whilst the arbitration proceedings and his election were pending, is, at the least, liable to the plaintiffs for a reasonable sum for such use and occupation. If really he had no right to reject the new term at the time when he did so, and after all that had happened up to that time, he should pay the rent fixed by the award, \$1,400, and taxes; but, if his rejection of it was right—and the plaintiffs seem to have acquiesced in it—then he should pay a reasonable sum, if not the full rent . . . ”: *Toronto General Hospital Trustees v. Sabiston* (1919) 47 D. L. R. 324; 16 O. W. N. 167; 44 O. L. R. 639, affirming 15 O. W. N. 333.

See also *Ryan v. Fraser* (1911) 19 O. W. R. 700; 2 O. W. N. 1386; *Lazier v. Armstrong* (1905) 5 O. W. R. 596, *Ross v. Gavin* (1920) 17 O. W. N. 498 [Kelly, J.], and *Dick v. Winkler* (1898) 12 M. R. 642.

A three-year lease provided for cancellation by the lessor upon sale subject to certain conditions. On September 8, 1915, the lessor sold the property and agreed to close the sale and make adjustments as of October 1. On the same day, September 8, he gave notice of cancellation and demanded possession after 30 days. The defendant wrote on September 18 that he could not vacate in 30 days. Interviews took place between the plaintiff and defendant, the latter remaining on the premises until April 1, 1916, when the purchaser demanded possession. The plaintiff sued for rent at the rate fixed by the lease from October 1, 1915, until April 1, 1916. It was held, following *Hellier v. Silcox* (1850) 19 L. J. (Q. B.) 295, that the defendant was liable for use and occupation, and judgment was given for the plaintiff for \$280, of which \$250 thereof was rental from October 1 until the end of the year, \$30 rental for the first three

months of 1916: *Gardner v. Holmes* [1918] 1 W. W. R. 456; 24 B. C. R. 416; 38 D. L. R. 156 [C. A.—Howay, C.C.J.].

And see *Brown v. Touks* (1918) 14 O. W. N. 46 [Lennox, J.].

### *Occupation Under an Agreement to Purchase.*

The position of a purchaser who enters under such an agreement has already been discussed under Articles 25 and 26—Tenancies at Will and at Sufferance.

This subject is discussed at p. 6, *ante*.

Where the vendee of an estate sold by auction, or otherwise, has been suffered to enter upon and hold the premises, while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although the jury find that the occupation has been beneficial: *Winterbottom v. Ingham* (1845) 7 Q. B. 611; *Kirkland v. Pounsett* (1809) 2 Taunt. 146; *Hearne v. Tomlin* (1793) Peake, N. P. C. 192; or that he has received rents from the under-tenants: *Rumball v. Wright* (1824) 1 C. & P. 589. But if the vendee retain possession after the contract for purchase has gone off, he will be liable in this form of action for the subsequent use and occupation: *Howard v. Shaw* (1841) 8 M. & W. 118.

A vendor who remains in possession of part of the property after the execution of the conveyance does not thereby become tenant to the purchaser (even at sufferance), nor liable to him in an action for use and occupation. The remedy is by ejectment, followed by a claim for mesne profits: *Tew v. Jones* (1844) 13 M. & W. 12.

### *Negotiations for a Lease.*

The position of a person entering during negotiations for a lease has already been discussed at p. 205, *ante*, Article 25—Tenancies at Will.

Where a party has entered into possession of premises in the expectation that a formal lease would be duly

executed, and having so entered, has occupied and enjoyed the premises beneficially, then, if the matter is broken off before any lease is executed, he is liable, in an action for use and occupation, to pay such sum as a jury may find the occupation to be reasonably worth, although there is no agreement between the parties: *Dawes v. Dowling* (1874) 31 L. T. 65; 22 W. R. 770; *Coggan v. Warwick* (1852) 3 C. & K. 40; *Smith v. Eldridge* (1854) 15 C. B. 236.

A lessee's offer for certain premises was accepted by the lessor's agents, and the lessee was admitted to possession pending the final arrangements, and, with the consent of the lessors, began to make certain structural alterations; but before the lease was executed the lessor declined to complete, because the lessee, who acted as agent for the Salvation Army, insisted on the right to put up a banner which would cover the whole of the premises. An injunction against doing so having been obtained, the lessee afterwards continued in possession, or at all events kept the keys, which the Court considered to be equivalent to keeping possession, and it was held that he was liable for use and occupation: *Fawkner v. Booth* (1893) 10 T. L. R. 83; 9 T. L. R. 558.

### *Corporations.*

Corporations aggregate may be sued for use and occupation: *Beverley v. Lincoln Gas Light and Coke Co.* (1837) 6 Ad. & El. 820. Where any corporation has actually used and occupied land for a corporate purpose, by the permission of the owner, it is liable to an action for use and occupation, though there be no contract under seal for such occupation: *Maynard v. Gamble* (1864) 13 U. C. C. P. 56; *Lowe v. London and North Western Railway* (1852) 18 Q. B. 632; 21 L. J. (Q. B.) 361. But as they cannot bind themselves by an executory contract, not under their common seal, they will be liable for use and occupation during such period as they actually occupy, and not afterwards under any implied tenancy from year to year: *Finlay v.*

*Bristol and Exeter Railway Co.* (1852) 7 Exch. 409; 21 L. J. (Ex.) 117.

A mutual fire insurance company incorporated under the Manitoba Mutual Fire Insurance Act, R. S. M. 1913, c. 101, is not a trading company and cannot, therefore, enter into a binding lease of premises to be used by it as an office without affixing its seal (Cameron, J.A., dissented): *Richardson v. Urban Mutual Fire Insurance Co.* (1916) 26 M. R. 372 [C.A.].

A non-trading corporation which attempts to enter into a lease not under its seal is only liable in an action for use and occupation: *Finlay v. Bristol and Exeter R. W. Co.* (1852) 7 Ex. 409; *Garland v. Northumberland Paper and Electric Co. Ltd.* (1900) 31 O. R. 40; *Richardson v. Urban Mutual Co.* (*supra*).

There is a discussion by Riddell, J., in *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 [App. Div.], at p. 182, as to whether *Finlay v. Bristol, etc., Co.* is still good law, and Cameron, J.A., discusses the question in *Richardson v. Urban Mutual Co.* (*supra*), at p. 387. See also the remarks of Garrow, J.A., in *National, etc., Co. v. Smith's Falls, etc., Co.* (1907) 14 O. L. R. 22 [C. A.]; *Wilkes v. The Home Life Association of Canada* (1904) 8 O.L.R. 91 [Div. Ct.] and the notes to Article 3, where these cases are further discussed: also *Pulford v. Loyal Order of Moose* (1913) 5 W. W. R. 452, considered at p. 104, *ante* [C. A.].

Upon a summary application by the plaintiff company, under Rule 600, to eject the defendant from premises occupied by him as an overholding tenant, he set up that his term had been extended by an oral agreement with the secretary-treasurer of the plaintiff company. This was denied by the secretary-treasurer. *Semble*, that the issue of fact should be found in favour of the plaintiffs, if there was jurisdiction, upon such an application, to determine a disputed question of fact; and *quære*, whether there was such jurisdiction; the amendment to Rule 583 not covering cases under Rule 600. Held, however, that, if the fact was as stated by the

defendant, the plaintiffs were not bound by the agreement of the secretary-treasurer, no authority to him being shown, and the agreement not being one coming within the purposes for which the company was incorporated or any purposes ancillary or incidental thereto. The defendant was ordered to deliver up possession to the plaintiffs and to pay a sum of money for use and occupation: *Garland Manufacturing Co. v. Northumberland Paper and Electric Co.* (*supra*), followed; *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.* (*supra*), distinguished; *Sun Electrical Co. v. McClung* (1913) 25 W. L. R. 43 [Sask.].

See also *Re D. & S. Drug Co.* (1916) 10 W. W. R. 612 [Blain, M.]; [1917] 1 W. W. R. 374; 10 Alta. L. R. 266 [App. Div.].

#### *In Cases of Assignments for Creditors.*

In an action for the use and occupation of a store from the 1st of April to the 1st of July, 1875, it appeared that the defendant had made an assignment under the Insolvent Act of 1869 on the 20th April, but the assignee only occupied the shop while removing the goods to another store, which the defendant owned, when he returned the key to the defendant. On the 1st of May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon its confirmation. The deed was confirmed on the 14th June, when the defendant was allowed to continue on his own account the business, which since his assignment he had nominally conducted on behalf of the assignee, but no written reconveyance was ever made. It was proved, however, that people who wished to see the store applied to the defendant, and were shown over it by his son; that the plaintiff's agent had recognized the defendant as having possession, by sending people who inquired about the shop to him, as being the person who had it to dispose of; that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in conse-

quence of the deed of confirmation, and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on 1st July, and it was held that the action for use and occupation would lie against the defendant notwithstanding the assignment, as the evidence showed an occupation with the mutual recognition of the plaintiff as landlord and the defendant as tenant, and a sufficient transfer from the assignee to the defendant: *Blackburn v. Lawson* (1877) 2 A. R. 25.

The position of the assignee in such cases is discussed at length [p. 405, *post*].

Where a fraudulent conveyance was set aside at the suit of an official assignee the grantee who was in possession was held liable for use and occupation: *Smith v. Sugarman* (1910) 12 W. L. R. 585; 30 C. L. T. 542.

### *There Must be Entry.*

The principle is, that if a person have the actual use or enjoyment of land by the permission or sufferance of another, whether there be a demise or not, this form of action may be maintained to recover the agreed rent (if any), or a reasonable satisfaction for such use and occupation: *Smith v. Eldridge* (1854) 15 C. B. 236.

The defendant must have "held or occupied" the premises as tenant thereof to the plaintiff, or by his permission or sufferance, during the time when the rent or "reasonable satisfaction" accrued due: *Hyde v. Moakes* (1831) 5 C. & P. 42.

A lessee who has never entered has a mere *interesse termini*, but no estate [and see p. 172, *ante*], therefore he cannot be deemed to have "held, occupied or enjoyed" the premises within the meaning of the statute: *Edge v. Stafford* (1831), 1 C. & J. 391, 398; *Lowe v. Ross* (1850) 5 Exch. 553; *Towne v. D'Heinrich* (1853) 13 C. B. 892; 22 L. J. (C. P.) 219. In such cases it is not sufficient to prove the lease or agreement, but some occupation under it must be shown: *Woolley v. Watling* (1837) 7 C. & P. 610.

Whether a lessee has entered to take possession as tenant, is a question of fact for the jury: *Smith v. Twaart* (1841) 2 M. & G. 841; *How v. Kennett* (1835) 3 Ad. & El. 651. If a demise be made to A. and B., and A. enters under and by virtue of such demise, the jury may infer and find that he did so on behalf of himself and B., so as to render them both liable to an action for use and occupation: *Glen v. Dungey* (1849) 4 Exch. 61.

### *The Changes the Statute Made.*

The alteration introduced by the statute was, that proof of a demise, unless by deed, was no longer fatal to the action; but the terms of the demise might be used as evidence of the quantum of damages: *Beverley v. Lincoln Gas Light and Coke Co.* (1837), 6 Ad. & El. 829, n. (a). "An action for use and occupation existed before the 11 Geo. II. 19; [*Thompson v. Bennett* (1867) 17 U. C. C. P. 384]; but until the passing of that Act the plaintiff was nonsuited if a demise was proved. Except in that particular, the statute did not make the action maintainable in cases where it could not have been maintained before": *Churchward v. Ford* (1857) 2 H. & N. 449.

"Thereafter the prudent landlord who had no lease under seal, always sued in *assumpsit*—if no demise appeared at the trial, he recovered for use and occupation—if a demise were proved, he recovered the amount of rent reserved, that being used to fix the quantum of damages": *Young v. Bank of Nova Scotia* (1915) 34 O. L. R. 176 [App. Div.], per Riddell, J., at p. 180 *et seq.*, referring to *Beverley v. Lincoln Gas Light and Coke Co.* (*supra*), p. 829 (note) and *Churchward v. Ford* (*supra*).

If the demise be by deed an action for use and occupation will not lie: *McFarlane v. Buchanan* (1862) 12 U. C. C. P. 591.

"It is immaterial . . . to consider whether in other respects it (the action) was, as has been said, maintainable before the statute in all cases where it can now be maintained": see *Churchward v. Ford*: per Bramwell, B., 7 Encyclopædia Laws of England, 689.

*The Statute Considered.*

It is to be observed that this enactment is confined to actions "on the case," i.e., *assumpsit* for use and occupation: *Gibson v. Kirk* (1841) 1 Q. B. 850.

*The Holding.*

The words of the statute are in the alternative, "held or occupied"—"held or enjoyed." If, therefore, the lessee has once entered to take possession as tenant, and the term has commenced, he will be deemed "to hold" during the continuance of the term, and until it be legally determined by affluxion of time, notice to quit, surrender, merger or otherwise, whether he continue "to occupy" by himself or his under-tenants or not: *Lowe v. Ross* (1850) 5 Ex. 553; *Jones v. Reynolds* (1836) 7 C. & P. 335; 4 A. & E. 805; 6 N. & M. 441; *Berrey v. Lindley* (1841), 3 M. & G. 498; *Bessell v. Landsberg* (1845) 7 Q. B. 638; *Cannan v. Hartley* (1850), 9 C. B. 634; 19 L. J. C. P. 323. The principle is, that a constructive holding or occupation as tenant is sufficient, after entry, without actual occupation or enjoyment: *Pinero v. Judson* (1829) 6 Bing. 206; *Smith v. Twoart* (1841) 2 M. & G. 841; *Atkins v. Humphrey* (1846) 2 C. B. 654; 3 D. & L. 612; *Pollock v. Stacy* (1847) 9 Q. B. 1033; *Hughes v. Brooke* (1881) 43 U. C. R. 609. But it would be a misdirection to tell the jury that a constructive occupation is sufficient, before an actual entry to take possession, and without explaining the meaning of "constructive occupation": *Towne v. D'Heinrich* (1853) 13 C. B. 892; 22 L. J. (C. P.) 219.

*Who May Sue?*

The statute authorizes "the landlord or landlords" to maintain an action on the case for use and occupation. It must, therefore, appear that the plaintiff is landlord of the defendant in respect of the premises held or occupied by him. It is not sufficient that the plaintiff has a



good legal title to the property which would enable him to maintain ejectment; but some demise or agreement, express or implied, as between him and the defendant and some entry thereunder, or some possession or enjoyment in pursuance thereof, must be proved: *Camden v. Batterbury* [ante, p. 337]; *Churchward v. Ford* (1857) 2 H. & N. 449.

A mortgagee, whose mortgage was executed after the commencement of the defendant's tenancy, is an assignee of the reversion immediately expectant upon the determination of such tenancy, and may sue for use and occupation if the demise was not by deed. A mere notice of his mortgage, without any attornment, or other act on the part of the tenant, is sufficient: *Burrowes v. Gradin* (1843) 1 D. & L. 213 [and see p. 214, ante].

A mortgagee, whose mortgage was executed before the commencement of the defendant's tenancy under the mortgagor, cannot distrain or maintain an action for use and occupation until after the defendant has consented to hold of him as his tenant: *Towerson v. Jackson* [1891] 2 Q. B. 484; *Downe (Lord) v. Thompson* (1847) 9 Q. B. 1037. Until a new tenancy has been so created, the remedy is by ejectment, which may be maintained without any previous notice to quit or demand of possession [see p. 215, ante].

A mortgagor may sue his tenant for use and occupation under a demise not under seal, notwithstanding a mortgage in fee or for years, executed before the commencement of the tenancy, but under which the mortgagee has never entered: [see the statutory provisions noted at p. 217, ante].

If two or more tenants in common join in a demise, not under seal, reserving an entire rent to both or all of them, they may join in an action for use and occupation to recover such rent: *Lit. s. 317*; *Last v. Dinn* (1858) 28 L. J. (Ex.) 94; *Thompson v. Hakewill* (1865) 19 C. B. N. S. 713; 35 L. J. (C. P.) 18. But if there be a separate reservation as to each, then there must be separate actions: *Powis v. Smith* (1822) 5 B. & Ald. 850.

Corporations aggregate may maintain actions for use and occupation; for, although they cannot demise except by deed, such action does not necessarily suppose any demise; it is enough that the defendant used and occupied the premises by their permission or sufferance, which may well be without any deed: *Mayor of Thetford v. Tyler* (1845) 8 Q. B. 95; *Doe v. Bold* (1847), 11 Q. B. 128; *Finlayson v. Elliott* (1874) 21 Gr. 325, and see p. 343, *ante*.

In an action for use and occupation, any tenancy, or agreement for a tenancy, as between the plaintiff and the defendant (coupled with entry or possession thereunder) is sufficient, *ex. gr.*, a mere tenancy at will: *Howard v. Shaw* (1841) 8 M. & W. 122; or even a tenancy at sufferance: *Alford v. Vickery* (1842) 1 Car. & M. 280; *Bayley v. Bradley* (1848) 5 C. B. 396.

A lessor, who by the demise has parted with his whole estate in the premises, may maintain an action for use and occupation to recover the agreed rent if the demise be not under seal, or an action of covenant if the demise be under seal: *Pollock v. Stacy* (1847) 9 Q. B. 1033.

A lessor having died, one of the devisees under the will refused to act, though his formal renunciation in writing was not made until after the rent in question had accrued due, and it was held that he was not a necessary party to an action for use and occupation to recover such rent: *Hughes v. Brooke* (1881) 43 U. C. R. 609.

The executors or administrators of a lessor, who died seised of a reversion in fee, may recover the arrears of rent which became due before his death, the rent for that period being a fruit fallen during his lifetime: *Dollen v. Batt* (1858) 4 C. B. N. S. 760, 772. So if he died possessed of the reversion for the residue of a term; and in such action they may also recover the rent which became payable after his death.

So, if the lessor die after the expiration of the term, the executors may recover for use and occupation since the end of the term: *Seymour v. Graham* (1864) 23 U. C. R. 272.

H. went into possession of property under an agreement with A. for three years. Before the expiration of the term A. conveyed the property in fee to C., and told H. that the last quarter's rent must be paid to C. H. paid the rent accordingly, and remained in possession after the expiration of the term, but refused to recognize C. as landlord. In an action for use and occupation, it was held that C. had made out a *prima facie* case, though H. had no notice of the conveyance, and though A. admitted that he had no title to the land, and went there by permission of the owner; *Connell v. Hammond* (1851) 7 N. B. R. 120.

### *Who May be Sued?*

A tenant from year to year, at a rent payable quarterly, half-yearly, or yearly, and whose term is duly surrendered or determined by act and operation of law before the current rent becomes due, is not liable for such rent, nor for use and occupation *pro rata* to the time of the determination of his tenancy, unless some new contract to pay rent *pro rata* can be inferred as a fact by the jury from the conduct of the parties: *Grimman v. Legge* (1828) 8 B. & C. 324; 2 M. & R. 438; *Hall v. Burgess* (1826) 5 B. & C. 332; 8 D. & R. 67.

A lessee who has underlet the demised premises may be sued for use and occupation, for he holds the premises as tenant, and occupies them by his under-tenant: *Bull v. Sibbs* (1799) 8 T. R. 327.

To support an action for use and occupation against a person who is not lessee of the premises, it must be shown that he was substituted for the lessee. Where the lessee assigned all his stock-in-trade to A., who took possession, and he or his brother paid the lessor one quarter's rent, and his son swore also that before the next quarter fell due, the brother said to the lessor, "We have paid for the last quarter, and I suppose we must pay for this quarter"; it was held to be properly left to the jury whether A. had been substituted for the lessee, the lease still running, and that they were justified in

finding for the lessor: *Darch v. McLeod* (1858) 16 U. C. R. 614; *Phipps v. Sculthorpe* (1817) 1 B. & Ald. 50.

Unless the substituted tenancy has been created, or there has been an assignment of the lease, the landlord should sue the original tenant, and not another person, who has entered into possession during the continuance of the lease: *Hyde v. Moakes* (1831) 5 C. & P. 42.

An assignee of a term, who has never entered into possession of the premises, or into receipt of the rents and profits thereof, is not liable to an action for use and occupation: *How v. Kennett* (1835) 3 A. & E. 659; 5 N. & M. 1; *Lowe v. Ross* (1850) 5 Exch. 556. Whether he has entered to take possession as assignee, or merely for some collateral purpose, is a question of fact for the jury: *How v. Kennett* (*supra*); *Jones v. Reynolds* (1836) 7 C. & P. 335; *Sullivan v. Jones* (1820) 3 C. & P. 579. If one of several joint assignees has entered with the privity or assent of the other or others, that is sufficient to render all of them liable for use and occupation: *Electric Telegraph Co. v. Moore* (1861) 2 F. & F. 363.

The executors or administrators of a deceased tenant are liable as such, to the extent of assets, for the rent reserved upon a parol demise, whether they have entered or not: *Atkins v. Humphrey* (1846) 2 C. B. 654. They may get rid of such liability in the manner prescribed by the statutes noted at p. 1010, *post*. They are not liable personally as assignees of the term, unless they have entered to take possession of the demised premises: *Remnant v. Bremridge* (1818), 8 Taunt. 191; *Tremeere v. Morison* (1834); 1 Bing. N. C. 89; *Kearsley v. Oxley* (1864), 2 H. & C. 896. An entry by one of several executors will not enure as an entry by all of them so as to render them jointly liable *de bonis propriis* in an action for use and occupation: *Nation v. Tozer* (1834), 1 C. M. & R. 172; 3 A. & E. 667. They may get rid of their liability as assignees by assigning over: [see p. 1040, *post*].

A vendor of land obtained a Court order cancelling the agreement of sale because of default in payment of

the purchase-price. Certain persons who were in possession claiming under assignments of the agreement were not made parties but were served with the order *nisi*, but took no proceedings, and on the order being made cancelling the agreement were notified thereof and to vacate the premises or pay a specified rental. They remained in possession claiming rights in the land and objecting to non-joinder as defendant. Held, they were liable to pay for use of the premises: *Waters v. Currie et al.* [1919] 3 W. W. R. 525 [Alta.].

### *A Reasonable Satisfaction.*

Where no specific rent has been agreed on, the landlord may recover in this form of action a reasonable satisfaction for the use and occupation of the lands, tenements or hereditaments held or occupied by the defendant as his tenant, or by his permission or sufferance: see the provisions of the statute and *Tomlinson v. Day* (1821) 2 Brod. & B. 680. "He who holds my premises without an express bargain agrees to pay what a jury may find the occupation to be worth. This is a principle resulting from the nature of an action for use and occupation": *Thetford (Mayor of) v. Tyler* (1845) 8 Q. B. 100.

Where a specific rent has been agreed on, payable quarterly, half-yearly, or yearly, such rent is the proper measure of damages; and the lease (if not under seal) or the written agreement may, by virtue of the statute, be used as evidence of the quantum of damages to be recovered, and of the time at which such rent became payable. It makes no difference in this respect that the agreement is void as to the duration of the term therein mentioned by the Statute of Frauds: *Collett v. Curling* (1847) 10 Q. B. 785; *Smallwood v. Sheppards* [1895] 2 Q. B. 627. But if the defendant has not had the use and occupation of all the premises agreed to be demised, or if there has been an eviction from part, by reason of a defect in the plaintiff's title, the jury may ascertain the

value of the occupation of the land actually enjoyed, without regarding the amount of rent reserved by the agreement: *Tomlinson v. Day* (1821) 2 Brod. & B. 680.

So where the plaintiff has not performed a condition precedent on his part, *ex. gr.*, to do certain repairs: *Smith v. Eldridge* (1854) 15 C. B. 236; *Smith v. Twoart* (1841) 2 M. & G. 841; *Toronto Hospital Trustees v. Heward* (1858) 8 U. C. C. P. 84.

Where, by express contract, rent is reserved, payable yearly, half-yearly, quarterly, or at other stated periods, the rent, as between the parties, accrues at the expiration of those periods only, and not *de die in diem*: *Collett v. Curling* (1847) 10 Q. B. 785. Therefore in such cases no rent or "compensation" for use and occupation can generally be recovered for a proportionable part of a less period, except under special circumstances, from which a new agreement to pay rent *pro rata* may be implied, and found as a fact by the jury: *Grimman v. Legge* (1828) 8 B. & C. 324; *Hall v. Burgess* (1826) 5 B. & C. 332.

When it is mutually agreed to put an end to a tenancy during a current quarter, the tenant to pay *pro rata* to that time, and the landlord accordingly retakes possession, the amount so agreed to be paid may be recovered in an action for use and occupation: *Thomas v. Williams* (1834) 1 A. & E. 478. Under the Apportionment Act [see p. 329], the apportioned rent is not payable until the entire portion would have become due.

Where houses or other buildings are demised at a certain rent (whether orally or otherwise), and there is no stipulation that the rent shall cease in the event of the premises being destroyed by fire, which event happens, the landlord may recover the subsequently accruing rent in an action for use and occupation; for the land remains and is "held" by the tenant, although the houses and buildings are uninhabitable until rebuilt: [see p. 288, *ante*]. The tenant himself may rebuild them if it be worth his while: [*Baker v. Holtzapffel* p. 288, *ante*]; but he must continue to pay his rent until his term expires,

or is duly determined by notice to quit, or otherwise. If there be a special stipulation that the rent shall cease in the event of a fire, which happens, a proportionable part of the rent to that time may be recovered in an action for use and occupation, the agreement showing a contract in respect of the occupation *de die diem*: *Packer v. Gibbins* (1841) 1 Q. B. 421; 5 Jur. 1036; 1 G. & D. 10. And even where a tenant from year to year occupies an upper floor, he is liable for use and occupation in the event of fire: *Izon v. Gorton* (1839) 5 Bing N. C. 501; 7 Scott 537, 3 Jur. 653. Where a yearly tenant at £47 per annum continued in possession after the determination of his tenancy and during negotiations for a new lease at £80 per annum, which ultimately went off; it was held that it was a question for the jury what rent was fairly payable for the continued holding: *Thetford (Mayor of) v. Tyler* (1845) 8 Q. B. 95.

*When the Action will not Lie.*

It has already appeared [p. 338, *ante*] that if there be a demise under seal, the plaintiff cannot sue for use and occupation.

If there was no express or implied tenancy as between the plaintiff and the defendant, during the period in respect whereof the rent or compensation is claimed, an action for use and occupation cannot be supported, notwithstanding the plaintiff was really entitled to the property: *Camden v. Batterbury* [*ante*, p. 337]. Thus where the defendant occupied as tenant to another person, from whom he obtained the possession: *Churchward v. Ford* (1857) 2 H. & N. 449; or as a mere wrongdoer or wilful trespasser: *Tew v. Jones* (1844) 13 M. & W. 12.

No judgment for an amount for use and occupation can be given on an application by way of originating notice to eject [see p. 946]: *Wallace v. Day* (1912) 22 W. L. R. 22; 6 D. L. R. 281; 2 W. W. R. 846.

In *City of Toronto v. Ward* [considered at length at pp. 814, *et seq.* (*post*)], it was held that the plaintiff could not recover for use and occupation of an encroach-

ment prior to the determination of the lease although it would be entitled to be paid therefor afterward.

*Defences to the Action.*

It is a good defence to an action for use and occupation that the defendant entered under an agreement, not in writing, for a lease for 42 years, under which no rent was to be paid until certain conditions were performed by the plaintiff, which were never performed: *Toronto Hospital Trustees v. Heward* (1858) 8 U. C. C. P. 84.

An eviction by a landlord of his tenant from a part of the demised premises creates a suspension of the entire rent during the continuance of the eviction; but the tenancy is not thereby put an end to; nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent [see p. 285, *ante*].

An eviction from part only will not exonerate the tenant from liability to pay for the use and occupation of the residue which he retains in his possession, but he may immediately quit possession of such residue, and so get rid of all liability for subsequent use and occupation: *Smith v. Raleigh* (1814) 3 Camp. 513.

After an eviction, and an attornment to the person evicting, the tenant is not liable for subsequent rent to the former landlord: *Newport v. Hardy* (1845) 2 D. & L. 921. But such eviction would afford no defence with respect to rent previously due: *Selby v. Browne* (1845) 7 Q. B. 620; *Hartshorne v. Watson* (1838) 4 Bing. (N.C.) 178.

The principle which prevents a tenant from denying his landlord's title [see p. 80, *ante*], applies in an action for use and occupation by a person who is himself a lessee. The tenant holding under him cannot set up the defence that the lease to the plaintiff contains a covenant that the lessor shall be allowed to re-enter if the lease is assigned or the premises sublet without the lessor's license, and that there was no consent to the defendant's occupation. This is the law where the defendant has not



been disturbed in his enjoyment: *Henderson v. Torrance* (1845) 2 U. C. R. 402; *Burrows v. Gates* (1858) 8 U. C. C. P. 121.

It is a good defence that the landlord has distrained, and from the distress has satisfied his claim for rent [see Articles 47 and 48].

A parol lease conveying all the residue of a term (less than three years), and intended to create the relation of landlord and tenant, will sustain this action, although no reversion be left in the plaintiff, and he could not distrain: *Pollock v. Stacy* (1847) 9 Q. B. 1035. An admission of the tenancy by the defendant, and of the amount of rent payable by him, will be sufficient evidence thereof against him: *Sullivan v. Jones* (1829) 3 C. & P. 579. Evidence that the defendant has actually occupied the premises, and has on one or more occasions paid rent to the plaintiff in respect thereof, will be *prima facie* sufficient. Payment of rent is a sufficient recognition of the landlord's title to support an action for use and occupation, although it appear upon the evidence on the part of the plaintiff that the defendant originally came in under another person, or that the plaintiff has only an equitable estate: *Dolby v. Iles* (1840) 11 A. & E. 335.

It was formerly held to be a good defence to an action for use and occupation that the defendant had not had any beneficial occupation of the premises during the period in respect of which the rent was claimed, either by reason of want of repairs, or of a nuisance, or the like, whereby the premises became unfit for comfortable occupation, but such decisions have been overruled, and it has been decided that where premises have become totally uninhabitable from the wrongful omission of the landlord to repair them pursuant to his covenant or promise, the tenant cannot lawfully throw them up so as to exonerate himself from further rent: see Article 41, p. 285, *ante*.

When an unfurnished house is not in a tenantable condition the lessor may, after the term is up, sue for use and occupation, where the rent is payable in advance,

and there is no express covenant by him that the premises should be habitable: *Gillis v. Morrison* (1882) 22 N. B. R. 207.

*An action for rent may be maintained where an action for use and occupation will not lie.*

In some cases an ordinary action for rent may be maintained where an action for use and occupation will not lie. For instance, a lessee who has never entered to take possession as tenant may be liable on his contract to pay rent: *Bull v. Sibbs* (1799) 8 T. R. 327; but not to an action for use and occupation: *Edge v. Strafford* (1831) 1 C. & J. 391, 398; *Lowe v. Ross* (1850) 5 Exch. 553; 19 L. J. (Ex.) 318; *Towne v. D'Heinrich* (1853), 13 C. B. 892; 22 L. J. (C. P.) 219; so an assignee of the term, who has never entered to take possession as assignee, may be liable to an action for rent: *Ringer v. Cann* (1838) 3 M. & W. 343; *Burton v. Barclay* (1831), 7 Bing. 745; *Williams v. Bosanquet* (1819), 1 Brod. & B. 238, but not to an action for use and occupation: *How v. Kennett* (1835) 3 A. & E. 659; *Lowe v. Ross* (1850) 4 Exch. 556; *Clarke v. Webb* (1834) 1 C. M. & R. 29; *Jones v. Reynolds* (1836) 7 C. & P. 335: and see Article 36.

#### THE TENANT HAS ALL DAY TO PAY.

ARTICLE 46.— Where rent becomes due on a day certain, the lessee has the whole of that day in which to pay it; it is not in arrear until after midnight of that day.

[Authorities: *Sawyer-Massey Co. v. White* (1915), 8 W. W. R. 493; [Sask. Ct. en B.]: *Child v. Edwards* [1909] 2 K. B. 753; 78 L. J. (K. B.) 1061].

Rent due on a Sunday must be paid on that day and if not so paid a distress made on Monday is not illegal: *Child v. Edwards* (*supra*) [Ridley, J.] and see the criticism of this decision in (1909) 29 C. L. T., at p. 817.

## DISTRESS SUSPENDS THE RIGHT OF ACTION.

ARTICLE 47.—The levying of a distress for the whole rent suspends the remedy by action for the whole rent, as long as the distress continues a pledge—that is until sale—no matter what proportion the value of the goods bears to the amount due.

[Authorities: *Lehain v. Phillpott* (1875) L. R. 10 Ex. 242; 44 L. J. Ex. 225; *Smith v. Haight* (1899), 4 Terr. L. R. 102 [Wetmore, J.]; *Gray v. Currie* (1889), 22 N. S. R. 262; *McKeown v. Lechtzier* (1913) 26 W. L. R. 264; 28 W. L. R. 558; 24 M. R. 295; [C. A.]; [Ct. en B.]; *Hoyes v. Creery* [1918] 1 W. W. R. 873; 24 B. C. R. 505; 39 D. L. R. 516 [C. A.]].

In *McKeown v. Lechtzier* (*supra*), Curran, J., held that he would not non-suit a landlord suing for rent who had commenced his action after he had distrained for rent, but before sale, merely because the action had been prematurely brought, and that if the goods had been sold before the trial the landlord should have judgment for the amount of the rent less the proceeds of the sale.

In *Fawell v. Andrew* (p. 248,) the Court en Banc held that a mortgagee who distrained under the landlord and tenant provisions in his mortgage could not have any higher rights than a landlord and that his right to judgment for the mortgage debt was suspended while the distress existed.

In *Whittaker v. Goggin* (1908) 38 N. B. R. 378; 4 E. L. R. 530, it was held that a landlord could not, during the currency of the lease and before the expiration of the term, *re-enter* for non-payment of rent for which he has distrained on goods and chattels still held by him under the distress.

Reference should also be made to Article 41 dealing with abatement and suspension of rent. No rent can be recovered where the contract is illegal: see. p. 75, *ante*.

ACTION FOR BALANCE DUE AFTER DISTRESS  
SOLD.

ARTICLE 48.—When goods have been sold under distress for rent, and the proceeds are insufficient to satisfy the rent, the landlord has his remedy by action.

[Authorities: *Philpott v. Lehain* (1876), 35 L. T. R. 855; *McKeown v. Lechtzier* (1913) 26 W. L. R. 264; (1914) 28 W. L. R. 558; 20 D. L. R. 986; 24 M. R. 295 (C.A.); 7 W. W. R. 1394].

## CHAPTER VIII.

### *Distress.*

- ARTICLE 49: Distress defined.  
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- ARTICLE 63: Taking Security for Rent.
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## DISTRESS DEFINED.

ARTICLE 49.—Distress for rent is a summary remedy allowed to the landlord or assignee of the reversion during the term or within six months after its expiration, if the title of the landlord and the possession of the tenant continue.

[Authorities: *Lynett v. Parkinson* (1850) 1 U. C. C. P. 97 (Macaulay, C.J.).]

*Distress Defined.*

“It is the taking without legal process, cattle or goods as a pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a distress; an inaccuracy, which the older text-writers usually avoided.” Stroud, p. 555, and authorities there cited.

*Rent.*

See Articles 33 and 34 for a definition of “rent.”

*The Necessity for Distress.*

A landlord is not entitled to hold the goods of his tenant without a distress: *Mah Po v. McCarthy* (1909) 2 Sask. L. R. 119; 10 W. L. R. 670 [Lamont, J.].

*When it may be exercised.*

See Article 50.

*It is a Common Law Right in the Case of Rent-Service.*

“The right to distrain was not given by Statute, but existed at common law”—per Cameron, J.A., in *Dewar v. Clements* (1910) 20 M. R. 212 [C.A.] at 213.

The right of distress is not a security held by a creditor in respect of a debt: *West v. Lee Soon & Lee Shun* (1915) 32 W. L. R. 961; 9 W. W. R. 644; 24 D. L. R. 813; 8 Sask. L. R. 243.

It is not a security but a particular remedy which arises on non-payment and not a remedy which the Mercantile Law Amendment Act entitles the landlord to use when he has had to pay a municipality taxes which his tenant has covenanted to pay: see *In re Russell* (1885) 29 Ch. D. 254; *Boone v. Martin* (1920), 47 O. L. R. 205; 53 D. L. R. 25 [App. Div.—Rose, J.].

### *The Statutory Right.*

The right has been extended by Statute to cases of rents seck: See Article 57, p. 387, *post*.

### *The Reversion.*

The necessity for a reversion is discussed at p. 2, *ante*.

In *O'Connor v. Peltier* (1908) 18 M. R. 91, 8 W. L. R. 576, P., the lessee of certain lands, made a lease of the same premises to O. for the full term of the lease held by him—at an advanced rental. Later O. went into default and P. distrained. Macdonald, J., held that P. having no reversion could not distrain; a distress was not authorized by statute or express agreement, and said at p. 93: “The argument is not that the ordinary contingent right of re-entry created a sufficient reversion to support a distress, but that such contingent right of re-entry together with the difference in the rent reserved and the absolute covenant to deliver up possession to the lessor at the end of the term, showed an intention to create the relationship of landlord and tenant, and this created a reversion by estoppel sufficient to support a distress. I cannot, however, agree with that proposition. A right of entry is not an estate, and the difference in rent reserved in the later lease cannot affect the condition of the estate.”

R. S. O. 1914, c. 155, s. 3, provides that the relation of landlord and tenant shall not depend on tenure, and a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation, nor shall it be necessary in order to give a landlord the right of distress that there shall be an agreement for that purpose between the parties.

In *Harpelle v. Carroll* (1895) 27 O. R. 240, already discussed [p. 3, *ante*], Meredith, C.J., said, pp. 247, *et seq.*: "But even if section 4 [now 3] of the Ontario Act apply to existing leases, I do not think that it has the effect of taking away the common law right of distress of the landlord. That right appears to have been borrowed from the civil law, and was the remedy which was given to the lord for the recovery of the rent or service which his tenant had obliged himself by his feudal contract to render to him in lieu of the right which the lord had, under the feudal system, of resuming his feud for non-performance of those services, and in this sense his right of distress had a feudal origin which the terms 'landlord' and 'tenant' betoken. That which the tenant was obliged to render was designated rent service, and rent service could be rendered only to the lord of whom the lands were holden. After the passing of the Statute *Quia Emptores*, and the consequent abolition of subinfeudation, a reversion in the landlord was necessary to create the relation of landlord and tenant, and to make the rent payable by the tenant rent service, to which the right of distress was incident. After the passing of that act, if one made a lease for life or gift in tail, saving the reversion to himself, with a reservation of rent or other service, that was a rent service for which the donor or lessor had a remedy by distress as before the statute, 'for neither the lessee nor donee was feoffatus within that Act; because there is a reversion in the donor sufficient to support the tenure of him': Gilbert on Rents, p. 15. But, 'in the case of a feoffment in fee, or a lease for life the remainder in fee, if the feoffer reserves a rent, such rent is rent seek, because it is unprofitable to the



feoffee, he having no remedy for the recovery of it, the reason whereof is because the land out of which the rent is reserved, is not held of the feoffer, and consequently the feoffee is not obliged to take the oath of fealty to him for lands which are held of another, and where there was no fealty due, there could be no seizure, by the old law, for nonperformance of the service, and consequently no distress without a particular provision of the parties': *ibid.*, pages 15 and 16. It would seem to follow, therefore, that the relation of landlord and tenant properly so called, was not created unless the lessor retained to himself the reversion, but that it was created whenever the rent was reserved by a lessor having the reversion, and the result of this would appear to be, that whenever the relation of landlord and tenant was created, it drew with it the right to distrain for the rent reserved by the lessor: and, as put in Woodfall on Landlord and Tenant, . . . Distress is incident of common right to every rent service properly so called, and the rent due from a tenant to a landlord is properly called a 'rent service,' though this description of it has long passed out of common use.'

"Now the section in question does not abolish the relation of landlord and tenant and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long-existing and well-known relation: it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it was after the Statute Quia Emptores, but it is to be deemed to be founded on contract express or implied. It was always, I take it, necessary that in a certain sense the relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter, the latter requisite, and to create the relation whenever, as

it provides, there shall be an agreement to hold land from or under another 'in consideration of any rent.' "

*Who may distrain?*

The Landlord or Assignee of the Reversion, p. 366.

The Crown, p. 367.

Executors and Administrators, p. 368.

Execution Creditors, p. 369.

Infants, p. 370.

Joint Tenants and Tenants in Common, p. 370.

Married Women, p. 371.

Mortgagors, p. 371.

Mortgagees, p. 372.

As to who may be a Landlord, see Article 3 and notes, p. 20, *ante*.

*The Landlord or Assignee of the Reversion.*

The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, which must be vested in him at the time of the distress: *Staveley v. Allcock* (1851) 16 Q. B. 636; *Smith v. Torr* (1862) 3 F. & F. 505; *O'Connor v. Peltier* (1908) 18 M. R. 91 [Macdonald, J.]; *McCoig v. Griffith* (1909) 2 Alta. L. R. 335.

*The position of the Assignor of the Reversion.*

So that while the person legally entitled to the immediate reversion on a lease, *when any of the rent thereby reserved becomes due*, may distrain for such rent by virtue of the common law, if he afterwards assign the reversion, either absolutely or by way of mortgage, his remedy by distress for *such* arrears will be lost: *Meagher v. Coleman* (1879) 13 N. S. R. 271; *Wittrock v. Hallinan* (1855) 13 U. C. R. 135; *Oliver v. Mowat* (1873) 34 U. C. R. 472; *Dauphinais v. Clark* (1885) 3 M. R. 225 (*the Case of a Mortgage*).

The reason is that the right to distrain, being a remedy existing by reason of the privity of estate, becomes

extinct by the transfer as regards the assignor: *Hartley v. Jarvis* (1849) 7 U. C. R. 545.

*The Position of the Assignee of the Reversion.*

An assignee of the reversion cannot distrain for rent which accrued due *before* the assignment: *Sharp v. Key* (1841) 8 M. & W. 349; *Wittrock v. Hallinan* (1855) 13 U. C. R. 135.

*The Assignee of the Rent.*

See Article 57.

*Assignment by a Lessee.*

If a lessee for years assign his term reserving rent, but without an express power of distress, he cannot distrain for it when in arrear, because he has no reversion; his only remedy is by an action on the contract: — *v. Cooper* (1768) 2 Wilson, 375; *Smith v. Mapleback* (1786) 1 T. R. 441; *Preece v. Corrie* (1828) 5 Bing. 24; *Pascoe v. Pascoe* (1837) 3 Bing. N. C. 898.

*Subletting by a Lessee.*

A lessee cannot distrain upon his under-lessee for rent which becomes due after he has parted with his reversion: *Burne v. Richardson* (1813) 4 Taunt. 720.

*The Crown.*

See the various Acts noted at p. 37, *ante*; and 6 Hals. s. 785.

The 32 Hen. VIII. c. 39, has not abridged the prerogative of the crown, and, when in competition with a subject, the crown is entitled to priority in enforcing a distress, provided the same has not been completely executed by sale, thus taking the property out of the debtor: *Att.-Gen. v. Leonard* (1888) 38 Ch. D. 622; 57 L. J. Ch. 860; 59 L. T. 624; and see *R. v. Bank of Nova Scotia* (1885) 11 S. C. R. 1; *Liquidators v. R.* (1888) 17

S. C. R. 657; *Clarkson v. Att.-Gen.* (1887) 15 O. R. 632; 16 A. R. 202.

### *Executors and Administrators.*

By the common law, executors or administrators could not distrain for arrears incurred in the lifetime of the owner of a rent: Co. Lit. 162 a.

By 32 Hen. VIII. c. 37, s. 1, the executors and administrators of tenants in fee, fee-tail, or for term of life, of rent-services, rent-charges, rent-seck, and fee-farm rents, may distrain upon the lands chargeable with the payment thereof, so long as such lands remain in the possession of the tenant who ought to have paid them, or of any other person claiming under him by purchase, gift or descent. And see 3-4 Will. IV. c. 42, s. 37.

This statute has been considered a remedial law, extending to all executors of tenants for life, as well as those who before the statute were entitled to an action of debt, as those who had no remedy whatever: *Hool v. Bell* (1697) 1 Ld. Raym. 172; 3 Salk. 136.

### *Similar Legislation.*

Alberta: C. O. c. 119, s. 32, gives power to distrain and by s. 33, such arrears may be distrained for within six months after the determination of the lease.

British Columbia: R. S. B. C., (1911), c. 4, ss. 66, 67.

Manitoba: R. S. M. 1913, c. 200, ss. 59, 60.

New Brunswick: C. S. N. B. (1903), c. 153, ss. 18, 19.

Nova Scotia: R. S. N. S. (1900) c. 172, s. 14.

Ontario: By R. S. O. 1914, c. 155, s. 59, "the executors or administrators of a landlord may distrain for the arrears of rent due to such landlord in his lifetime [and may sue for the same] in like manner as such landlord might have done if living, and the powers and provisions contained in the Act relating to distresses for rent shall be applicable to the distresses so made."

Saskatchewan: Stats. 1919, c. 79, s. 39, and see R. S. S. (1909), c. 46, ss. 33 and 34.

An executor may distrain before probate, and may ratify a distress made by a bailiff in the name of the testator immediately after his death: *Whitehead v. Taylor* (1839) 10 A. & E. 210.

A testator by his will desired that his executors should sell and dispose of his land, and then nominated and appointed them to seal, execute, and deliver any deeds that might be necessary for making a title to the purchaser; it was held that the executors took no interest in the land, but had only a power, and consequently they could not distrain for rent accruing in their own time before the land was sold: *Nicholl v. Cotter* (1848) 5 U. C. R. 564. But under the Devolution of Estates Acts (O.) and similar Acts, in reference to the devolution of estates, the executors would now be entitled to distrain while the lands are vested in them for the purposes of administration: See p. 368, *ante*.

Where several executors demise to their co-executors at a fixed rent they may distrain: *Cowper v. Fletcher* (1865) 34 L. J. Q. B. 187; 6 B. & S. 464.

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for all the arrears not exceeding six years: *Braithwaite v. Cooksey* (1790) 1 H. Blac. 465.

### *Execution Creditors.*

An entry under an execution, either by elegit, statute merchant, or statute staple, gives such an estate in the land that the creditor is entitled to distrain: Bro. Abr. Distress, pl. 32; Cubit's Case (1606), 4 Co. R. 7; *Lloyd v. Davies* (1848) 2 Exch. 103.

Since the Judicature Act an elegit is not necessary to secure equitable execution: *Ex parte Evans* (1879), 13 Ch. D. 252 (C.A.); and it is not certain that an elegit can issue in Ontario: *Doe v. Burtch* (1834), 2 O. S. 514. In any case the position of the elegit creditor is very different from that of a creditor who has only a writ of fieri

facias in the hands of the sheriff. Though he is an assign to whom notice of a sale under mortgage must be given, it does not seem that he is such an assignee of the reversion as to be entitled to distrain, and his safest course would be to attach the rents.

In Manitoba the writ of *fi. fa.* lands and of *elegit* is abolished by statute. R. S. M. (1913) c. 46, Rules 737, 738.

### *Infants.*

It would seem that if an infant can make a lease [see p. 46] and has the right of distress, he may exercise the right in the ordinary way, either in his own person or by authorizing an agent to distrain for his benefit: *Owen v. Taylor* (1878) 39 U. C. R. 358. But an infant, it seems, cannot be a bailiff or agent for another person in making distress: *Cuckson v. Winter* (1828) 2 Man. & R. 313.

### *Joint Tenants.*

One joint tenant may distrain alone; but he must avow or justify such distress in his own right, and as bailiff of the others: *Pullen v. Palmer* (1696) 3 Salk. 207; Carth. 328; 5 Mod. 73.

A distress for rent may be authorized by one of several joint tenants: *Morgan v. Parry* (1856) 17 C. B. 334, 342.

He may sign a distress warrant, and thereby appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding: *Robinson v. Hoffman* (1828) 4 Bing. 562; 1 M. & P. 474; 3 C. & P. 234.

A surviving joint tenant may distrain for arrears accrued in the lifetime of his deceased companion: *Bullen*, 47; 2 Roll. Abr. 86.

### *Tenants in Common.*

Tenants in common should distrain severally, but if they join in the distress the irregularity will be cured by

the 11 Geo. II. c. 19 [see Article 81]; *Pullen v. Palmer*, (1696) 3 Salk. 207.

Where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent it was held that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terretenant they were tenants in common, and entitled each to a separate distress: *Whitley v. Roberts* (1825) McClel. & Y. 107.

After a devise of a reversion to two tenants in common, one of them may distrain for his share of the rent upon the lessee of the devisor, where such lessee has paid the whole rent to the other tenant in common after notice not to pay: *Harrison v. Barnby* (1793) 5 T. R. 246; *Powis v. Smith* (1822) 5 B. & Ald. 850.

### *Married Women.*

It is conceived that the Married Woman's Property Act [see Article 3, p. 53] has altered the common law rule as to distress by the husband. In respect of her chattel interest he could distrain for rent whether accruing before or during the marriage, while the 32 Hen. VIII. c. 37, s. 3, gave him the same power in respect of his wife's freeholds. But at the present day it would seem that the wife may distrain alone in respect of her separate property. Apart from any right the husband may have as tenant by the courtesy, any disposition she may make by will would have to be considered, or, in the absence of a will, his estate as her heir: *Archer v. Urquhart* (1893) 23 O. R. 214.

### *Mortgagor.*

A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof,

shall have been given by the mortgage, may sue for such possession, or sue or *distrain* for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person.

R. S. O. 1914, c. 112, s. 5 [The Mortgages Act] formerly appearing in the Judicature Act, R. S. O. 1897, c. 51, s. 58 (4).

### *Similar Legislation.*

Alberta: Judicature Act (1919), 9 Geo. V., c. 3, s. 37 (4).

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (12) [Laws Declaratory Act].

Manitoba: R. S. M. 1913, c. 46, s. 26 (*d*) [King's Bench Act].

New Brunswick: (1909) 9 Edw. VII., c. 5, s. 19 (5). [Judicature Act].

Nova Scotia: R. S. N. S. (1900) c. 155, s. 19 (4) [Judicature Act].

Saskatchewan: (1915) 5 Geo. V., c. 10, s. 25 (4) [King's Bench Act].

*See Puffer v. Ireland*, noted at p. 380, *post*.

### *Mortgagees.*

#### *Mortgage made Prior to Lease.*

As to mortgagees who are landlords see Articles 30, 31 and 32, dealing with attornment clauses in mortgages.

A lease made subsequent to a mortgage is void [see Article 28] as against the mortgagee who cannot *distrain* as there is no relation of landlord and tenant between him and the lessee: (1910) 11 Hals. s. 223.

If such a relationship is created there is, of course, the right to *distrain*: *ib*.



*Mortgage made Subsequently.*

A mortgagee cannot distrain for rent due upon a lease made by the mortgagor alone after the mortgage, unless he has accepted rent from the tenant or has given him notice to pay rent, and the tenant has acquiesced, so as to create a new tenancy, express or implied, as between the mortgagee and the tenant: *Rogers v. Humphreys* (1835), 4 A. & E. 299; 5 N. & M. 511; *Partington v. Woodcock* (1837), 6 A. & E. 690; 5 N. & M. 672; *Lambert v. Marsh* (1845), 2 U. C. R. 39.

A mortgagee, by indenture executed subsequently to a lease, after giving notice of his mortgage, can, apart from statute, distrain for rent in arrear and unpaid at the time of the notice, as well as for rent which accrues after such notice, although he was not in the actual seisin of the premises nor in receipt of the rents and profits thereof at the time the rent became due, provided the rent had accrued since the making of the mortgage: *Moss v. Gallimore* (1779) 1 Doug. 270; *Pope v. Biggs* (1829) 9 B. & C. 245; 4 M. & R. 183.

So at common law neither the mortgagee nor the mortgagor (the lessor) can distrain for rent which accrued due before the mortgage; the lessor cannot do so because he has parted with the reversion, and the notice given by the mortgagee only entitled him to rents accruing from the time his security was executed: *Dauphinais v. Clark* (1885) 3 M. R. 225; *Whittrock v. Hallinan* (1855) 13 U. C. C. R. 135.

*The Statute.*

Under the Apportionment Acts [considered at p. 322, *ante*], rent accrues from day to day, and the mortgagee cannot distrain for rent due prior to his notice; even if it accrued since the making of the mortgage.

*Within Six Months After its Expiration.*

This is the effect of the Statute 8 Anne, c. 14, ss. 6 and 7, under which there is no right to distrain unless within six months after the determination of the term

and for rent due before, and such distress must be made during the possession of the tenant from whom the arrears are due.

### *Similar Legislation.*

Alberta: The Statute of Anne is in force.

British Columbia: R. S. B. C. (1911) c. 126, ss. 4 and 5.

Manitoba: The Statute of Anne is in force.

New Brunswick: C. S. N. B. (1903) c. 153, s. 11.

Nova Scotia as: R. S. N. S. (1900) c. 172, s. 13.

Ontario: R. S. O. (1914) c. 155, s. 40.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 20.

This Statute does not apply where the landlord has forfeited the term: *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, followed in *Stanley v. Willis* (1914) 6 W. W. R. 498 [C.A.] both following *Grimwood v. Moss* (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239, and see Article 65, p. 418, *post*.

By the Landlord and Tenant Act R. S. O. (1914), c. 155, s. 41:—

“A person entitled to any rent or land for the life of another may recover by action or distress the rent due and owing at the time of the death of the person for whose life such rent or land depended as he might have done if the person by whose death the estate in such rent or land determined had continued in life.”

[This section—which was copied in Saskatchewan (1919), 9 Geo. V., c. 79, s. 21—is a re-enactment of (Imp.), 32 Hen. VIII., c. 37, s. 4]; see R. S. N. S. c. 172, s. 19, and C. S. N. B. 1903, c. 153, s. 5, noted at p. 335, *ante*.

A tenant held over after the expiration of his term and a distress was made more than six months after such expiration under a warrant signed and delivered to the bailiff before. There was no evidence that the landlord knew at the time of the distress being made so late but he allowed the sale to proceed with knowledge. Held, an illegal distress for which he was liable: *Dick v. Winkler* (1899) 12 M. R. 624 [Killam, C.J.] 19 C. L. T. 330.

## RECOVERY OF JUDGMENT.

ARTICLE 50.—If a judgment has been recovered for rent, a distress for the same rent will be illegal, and the tenant may recover damages for distraining where no rent is due.

[Authorities: *Chancellor v. Webster* (1893) 9 T. L. R. 568; *Potter v. Bradley* (1894) 10 T. L. R. 445; both referred to by Elwood, J., in *Douglas v. Carrington* (1914) 7 W. W. R. 59, at p. 61; 29 W. L. R. 90; 7 Sask. L. R. 80; 20 D. L. R. 919].

*Damages.*

The question of damages is discussed at p. 380, *post*.

The effect of taking security for rent upon the right of distress is discussed in Article 63, p. 415, *post*.

It has been seen that, conversely, a distress suspends an action for rent: Articles 47 and 48.

## CONDITIONS PRECEDENT TO DISTRESS.

ARTICLE 51.—Before there can be a distress there must be an actual demise, or at least a contract for one, at a fixed rent, or one which by calculation can be made certain.

[Authorities: *McInnes v. Stinson* (1858) 8 U. C. C. P. 34; *Re Knight Ex parte Voisey* (1882) 21 Ch. D. 442; 52 L. J. Ch. 121 (C. A.)]; *Stanier v. Fleming* (1893) 3 Terr. L. R. 323, R. S. N. S. (1900), c. 172, s. 1; and see C. S. N. B. (1903), c. 153, s. 9.

*“ There Must be an Actual Demise.”*

Where there is a tenancy of any kind, whether at will or from year to year, the right to distrain exists, the nature of the tenancy being immaterial: *McDonnell v. Building and Loan Assn.* (1885), 10 O. R. 580; *Buckley v. Russell* (1884), 24 N. B. R. 205 (tenancy at will); *Pegg v. I. O. F.* (1901) 1 O. L. R. 97 [Div. Ct.] (tenancy at will).

There can be no distress for a fee farm rent: *Bradbury v. Wright* (1781), 2 Doug. 624; nor in the case of a tenant at sufferance; *Alford v. Vickery* (1842), Car. & M. 280; *Jenner v. Clegg* (1832), 1 Moo. & R. 213.

The remedy by distress is given by the common law independent of all stipulations upon the subject of rent between the parties; but to authorize a distress of the tenant's goods rent must be payable; and if the landlord by deed releases his tenant from the payment of all rent under the lease he certainly cannot distrain: *Hayward v. Thacker* (1871), 31 U. C. R. 427.

A licensor may not distrain: *Rendell v. Roman* (1893) 9 T. L. R. 192; *Ward v. Day* (1863), 4 B. & S. 337; (1864), 5 B. & S. 359.

Where land is held under a métayér agreement [see p. 11, *ante*] there is no right of distress: *Oberlin v. McGregor* (1875) 26 U. C. C. P. 460.

There can be no distress against a person who occupies land without any rent reserved or payable: *McCaskill v. Rodd*, (1887) 14 O. R. 282.

"Certain conditions precedent to distress did not, however, exist in this case, viz., an express or *implied* demise which was subsisting at the time the rent for which distress was made fell due, and the reservation of a specific rent payable at a certain time": *Re D. & S. Drug Co.* (1916) 10 W. W. R. 612; [Blain, M.], but see as to a time certain, p. 282 (*ante*).

An actual tenancy at a fixed rent may be implied from very slight circumstances.

A tenant holding under an agreement for a lease, of which the Court will decree specific performance, is subject to the same right of distress as if the lease had been granted: *Crump v. Temple* (1890), 7 T. L. R. 120. See p. 105, *ante*.

And where such an agreement provides for payment of rent in advance the tenant may be distrained on where he has paid rent: *Walsh v. Lonsdale* [p. 107, *ante*].

It is to be observed, however, in reference to this case that the tenant having paid rent the distress was valid at

common law: *Lee v. Smith* (1854), 9 Exch. 662; 23 L. J. Ex. 198.

But where the Judicature Act is not in force [see p. 106, *ante*] the owner cannot distrain on a person in possession under a mere agreement for a lease not amounting to an actual demise without any other circumstances from which a tenancy at a fixed rent can be implied, and found by the Court or jury, as no rent, properly so called, is due for the occupation, but only a compensation in the nature of rent: *Dunk v. Hunter* (1822), 5 B. & Ald. 322; *Hegan v. Johnston* (1809) 2 Taunt. 148.

But if the agreement goes on to say that until the lease shall be executed the rent, covenants and agreements to be therein contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed, that will on entry create a tenancy at a fixed rent, for which there may be a distress, although no rent has been paid under the agreement: *Anderson v. Midland Ry. Co.* (1861) 3 E. & E. 614; 30 L. J. Q. B. 94; 7 Jur. N. S. 411; *Pinero v. Judson* (1829), 6 Bing. 206; *Rollason v. Leon* (1861), 7 H. & N. 73; 31 L. J. Ex. 96.

Memoranda or heads of agreement ascertaining no certain amount of rent being preparatory to a letting, and under which no rent has been paid, do not constitute a present demise entitling the lessor to distrain: *Cheney v. Taylor* (1844), 1 U. C. R. 166.

Action for trespass to goods. Held, that plaintiff never agreed to pay rent nor consented to hold property on terms set forth in defendant's letter, therefore, defendant had no right to distrain. A landlord cannot, by writing a letter, arbitrarily fix the rent which he is to receive unless the amount is assented to by agreement or by implication. Defendant's proceedings were altogether irregular and plaintiff is entitled to recover the whole value of the goods seized together with damages for injury to business. *White v. Cusak* (1909), 10 W. L. R. 553, 2 Sask. L. R. 106.

*A Rent Must be Payable.*

Where a tenant occupies without any rent reserved: *McCaskill v. Rodd* (1887), 14 O. R. 282, or where the landlord has by deed released his tenant from payment of all rent reserved: *Hayward v. Thacker* (1871) 31 U. C. R. 427, there can be no distress.

So where a rent becomes payable as damages, as in the case of interest on an overdue mortgage, it requires a new fixation: *Klinck v. Ontario T. L. & T. Co.* (1888), 16 O. R. 562.

So arrears of interest cannot be distrained for though the relation of landlord and tenant exists between the mortgagor and mortgagee: *Trust & L. Co. v. Lawra-son* (1882) 6 A. R. 286; 10 S. C. R. 679. This whole subject is discussed at p. 234.

A memorandum as follows: "Twenty-five years, \$50 a year, commencing from 1st September, 1880"; describing the property and signed by both parties (the lessee being in possession at the time negotiating for a lease), was held to create an actual demise at a fixed rent, for which a distress might be made: *Buckley v. Russell* (1884), 24 N. B. R. 205.

For crop rents see Article 54: rents payable in produce, Article 53, and by services, Article 55.

*The Rent Should be Fixed.*

See Article 33. The profit must be certain.

In New Brunswick a distress has been held illegal where there was no fixed rent: *Reilley v. McMinn* (1874), 15 N. B. R. 370; and in Nova Scotia it is provided that there must be an actual demise at a specific rent to warrant a distress: R. S. N. S. (1900) c. 172, s. 1.

A rent which may fluctuate or vary in amount on the happening of certain specified events is not an uncertain rent, if by calculation it can be made certain. *Re Knight Ex parte Voisey* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121 [C. A.]. And a rent of so much for each room run in a factory is good though the number may vary from time to time: *Walsh v. Lonsdale* (1882), 21 Ch. D. 9 [C. A.].

As to the time when rent is payable see Articles 38 and 54 (crop leases).

### ILLEGAL DISTRESS.

ARTICLE 52.—A distress is illegal if there is no rent due at the time of making the distress—and damages may be recovered.

[Authorities: *Town of Cobourg v. Cyclone Woven Wire Fence* (1919) 57 S. C. R. 289; 44 D. L. R. 34 [S. Ct. Can., Ont.]].

Restraint of Distress by Injunction; see Article 84, Suspension of Rent; see Article 41, Excessive Distress; Article 73.

By reason of the facts set out in 18 O. L. R. 487 [p. 291, *ante*], the tenant became entitled to a reasonable rebate in rent from 1st May, 1908, and a reference was pending to decide the amount. The landlord distrained for the full amount reserved and payable in November, December, 1908, and January, 1909. In an action for replevin and wrongful and excessive distress the Court held that the landlord's covenant to make the rebate did not directly affect the reservation of rent; the tenant's only remedy for failure to make the rebate was by action for breach of contract and the action for replevin must fail, the rent not having been tendered before the distress: *Davies v. Stacey* (1840) 12 A. & E. 506, and *Bickle v. Beatty* (1859) 17 U. C. R. 465, considered: *Hessey v. Quinn* (1910) 20 O. L. R. 442; 1 O. W. N. 515; 15 O. W. R. 505 [Osler, J.A.].

*Canadian Flax Mills Ltd. v. McGregor* (1909) 14 O. W.R. 17, 29 C.L.T. 868 [Teetzel, J.] it was held that there was no definite agreement between the parties and the amount paid by the tenant for use and occupation was a liberal one—the distress was illegal and damages fixed at \$300.

A mortgage of land became in arrear and the mortgagees notified the tenant to pay the rent to them; he did so but not until after the mortgagor had distrained. It was held that the distress was legal there being rent

in arrear: that the tenant protected himself by paying as he did and such payment was an answer to the claim for rent but not to the claim for the costs of the distress which the tenant must pay: *Puffer v. Ireland* (1905) 5 O. W. R. 447 [Street, J.] 25 C. L. T. 215; 10 O. L. R. 87.

*Meighen v. Armstrong* (1906), 16 M. R. 5, 2 W. L. R. 578 [Man.—Dubuc, C.J.] was the case of a crop lease dated 1st April, 1904, the rent reserved being one-third of the grain and one-third of the hay to be grown on the lands. No time was fixed for delivery and a distress was made on November 19th, 1904. It was held there was no rent due, the tenant had until 31st March, 1905, to make delivery and the distress was illegal, following *Mowat v. Clement*. It was also held that the distress was illegal because the tenant was not on the premises at the time and did not learn of it until eight days later. It was also irregular there being no notice, inventory or appraisement.

And see *Brock v. Foster* (1899) 34 N. B. R. 262: *Re Little and Beattie* (1917) 38 O. L. R. 551 [App. Div.] and the cases noted at p. 282, *ante*.

### *The Measure of Damages.*

The 2 Wm. & M. Sess. 1, c. 5, s. 5, provides that in case any such distress and sale as aforesaid (*i.e.*, sale after five days failing a replevy, see p. 497 (*post*), shall be made by virtue of this Act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained or sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double the value of the goods or chattels so distrained or sold, together with full costs of suit.



*Similar Legislation.*

This statute is re-enacted in Ontario as R. S. O. 1914, c. 155, s. 54 (2): in Saskatchewan, 1919, as c. 79, s. 36 (2) with the exception that instead of double value only "full satisfaction" shall be recovered and nothing is said as to costs of suit. The change was made in Ontario in 1911 [1 Geo. V. c. 37, s. 54] and in Saskatchewan in 1919.

The British Columbia Act, R. S. B. C. (1911), c. 65, s. 9, is a copy of the Imperial Statute.

The Nova Scotia Act, R. S. (1900) c. 172, s. 9, provides for "the value of the goods distrained and such further damages as [may] be awarded" to be given. The Act 2 W. & M. is in force in Manitoba: see *Dewar v. Clements* (*supra*) and Alberta, and has been copied without alteration in British Columbia, R. S. B. C. 1911, c. 65, s. 9.

The Act authorizes the recovery of the double value in an action by the owner of the goods, although he may not be the tenant: *Choderker v. Harrison* (1911) 20 M. R. 727; 15 W. L. R. 687 [C. A.—Robson, J.], and such double value may be recovered from the bailiff as well as the landlord: *ib.*, following *Hope v. White* (1866) 17 U. C. C. P. 52.

There is no power to reduce the double value and no discretion as to the costs which are fixed by the statute [J. A. s. 57 (3): R. S. O. 1897 c. 242, s. 18, ss. 2]: *Webb v. Box* (1910) 19 O. L. R. 540; 1 O. W. N. 112; 14 O. W. R. 802; 30 C. L. T. 100 [leave to appeal to Court of Appeal refused]; 15 O. W. R. 205; 30 C. L. T. 428; 1 O. W. N. 317.

This section (s. 5) is wrongly referred to in *Webb v. Box*, as s. 4 where it was considered as R. S. O. 1897 c. 342, s. 18 (2). It was argued that the use of "may" only allowed less than double damages to be given. Boyd, C., said, (544) "The pruning of expletives or superfluous words is not meant to make a change in the effect of the statute. I regard the English and Canadian cases expository of the statute in this province as still binding as

authorities." Held also that there was no power to reduce the double value under s. 57 (3) of the Judicature Act, now s. 19, enabling Court to "relieve against all penalties and forfeitures" (ref. to *Johnston v. Dom. of Can. Guarantee, &c. Co.* (1908) 17 O. L. R. 462, and views expressed by the Court of Appeal).

He said, p. 544, "the costs . . . are not in the position of ordinary costs of litigation: they are fixed by the statute itself, and the discretionary power given by the Rules . . . is not exercisable in regard to costs given by Statute: *Reeve v. Gibson* [1891] 1 Q. B. 652-660."

Action for damages for illegal distress. Defendant's agent had told plaintiff to pay an account, keep some out of the rent and remit balance, which he did. Defendant then distrained for the rent, the chattel seized being at once replevied. Held, no evidence of special damage. Judgment for \$5 damages with High Court costs: *Gormally v. McFee* (1909) 13 O. W. R. 590; 29 C. L. T. 519.

See also *Armstrong v. Sherlock* (1906) 8 O. W. R. 577; 9 O. W. R. 118 [Div. Ct.].

In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors. *Semble*, per Barker, J., that an unlawful sale of the defendants' goods which were being used by them in a particular way gives the defendants the right to demand the return of the proceeds by way of damages: *Clark v. Green* (1907) 1 E. L. R. 552; 37 N. B. R. 525; 26 Occ. N. 749.

The plaintiff was tenant of the defendant who had a chattel mortgage on the plaintiff's goods under which he might take possession if he felt unsafe or deemed the goods in danger of being sold or removed. The landlord distrained for rent when as the jury held there was no rent due and also seized under the chattel mortgage, although the jury held he had no reason for feeling unsafe or deeming the mortgaged goods in danger of

being sold or removed. The tenant commenced an action for damages eight days before the goods were sold. Britton, J., held that the tenant could not recover double damages under 2 W. & M. He also held that the distress being wrongful the landlord could not rely on the chattel mortgage as his defence: referring to *Dedrick v. Ashdown* (1888), 15 S. C. R. 227, as he had, by distraining, treated the goods as the tenant's. The Court of Appeal, on a consideration of the other issues, raised, especially as to whether or not there had been an abandonment or stay of proceedings under the distress, ordered a new trial. *Stone v. Brooks* (1903), 2 O. W. R. 306 [Britton, J.]: (1904) 3 O. W. R. 482: 527 [C. A.].

The goodwill of the business carried on by the tenant on the premises demised could not form an element in the calculation of damages to be awarded to him in an action for illegal distress where no rent was due, on the ground that he might, if he wished, have continued his business, and that the damages on this head were too remote to be charged against the defendant: *Stone v. Brooks* (1906) 7 O. W. R. 463 [Boyd, C.] 26 C. L. T. 346: [see 3 O. W. R. 527]. On appeal to a Divisional Court (1906)] 7 O. W. R. 732; 26 C. L. T. 405, it was held that the damage to the plaintiff's business was due to the defendant having made the distress under his chattel mortgage and "that the proper amount to be allowed would be reached if there were deducted from the damages awarded by the referee what has been allowed for the goods that were distrained for the rent, and there were added to the balance remaining the damages for the interference for the days on which plaintiff was wrongfully interfered with." A clause accelerating payment of a chattel mortgage in case of a distress for rent refers to a distress by one other than the mortgagee.

A verdict for damages for distress by a jury in excess of actual damages will not be set aside if the jury considered the distress to be a trespass, and there is some evidence upon which they founded their verdict: *Summers v. Blair* (1911) 19 O. W. R. 714; 2 O. W. N. 1374.

## RENT PAYABLE IN PRODUCE.

ARTICLE 53.—Rent reserved at a certain sum, payable in produce at the market price, is sufficiently certain to warrant a distress and sale.

[Authorities: *Thompson v. Marsh* (1834) 2 O. S. (U. C. Q. B. Jurist) 389; *Cumming v. Hill* (1838) 6 U. C. Q. B. O. S. 303].

See also the notes to Article 54 (*infra*).

## CROP RENTS.

ARTICLE 54.—Rent payable in a proportion of the crop to be grown upon the demised lands may be distrained for and the distress sold, and this although the rent reserved is not a fixed sum payable in kind, and although there is no time specified for the payment, in which case the time for payment is the end of each year of the term.

It has long been settled that rent may be payable in kind: *Hayden v. Crawford* (1833) 3 U. C. Q. B. (O. S.) 583; *Nowery v. Connolly* (1869) 29 U. C. R. 39; *Richardson v. Trinder* (1861) 11 U. C. C. P. 130, and see the notes to Article 33, p. 255, *ante*.

*The Right of Distress.*

*Thompson v. Marsh* (1834) 2 O. S. (U. C. Q. B. Jurist) 389, decided that where there is a fixed rent payable in kind, such as £50 a year payable in stock at the market price, it may be distrained for.

In *Nowery v. Connolly* (1869), 29 U. C. R. 39, the Court did not decide whether in cases where no fixed rent was reserved a distress could be made. Richards, C.J., discusses the question, expressing his own doubts but admitting that the weight of authority showed it to exist in such cases.

*Dick v. Winkler* (1899) 12 M. R. 624, 19 Occ. N. 330. (Killam, C.J.), held that such a right to distress existed following the above cases.

In *Mowat v. Clement* (1886) 3 M. R. 586, the question was raised but was not decided.

*The Time at which the Rent is Due.*

Where no provision is made as to the time when the rent is to be paid, the general rule is that the rent becomes due at the end of the year, and see Article 38.

In *Nowery v. Connolly* (*supra*), it was argued that the rent was payable as soon as the crop was harvested, or from time to time as each part was harvested, and Adam Wilson, J., who dissented, gave effect to this view. Richards, C.J., and Morrison, J., took the view that the most convenient period would be the end of the year. The landlord was to furnish seed for the first year and to "receive as rent for the first year two-thirds of all the grain when cleaned, threshed and ready for market; also one-third of the straw, turnips and root-crops; and half the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half." It was held that the words "when cleaned" applied only to the first year's crop, that the second year's rent did not become due until the end of the year, namely, March 31st, 1868 (the lease was for five years from March 31st, 1866), and a distress on December 15th, 1867, was premature.

Richards, C.J., suggests, p. 50, "that if the tenant had paid his rent for three or four years of the term by delivering immediately after harvest that would of itself be evidence in the absence of any other of a holding on those terms and perhaps might be some evidence that that was the intention of the parties under this lease."

In *Robinson v. Lott* (1909) 11 W. L. R. 59 (Sask.), Johnstone, J., said, p. 63: "No time was mentioned in the lease when the rent should become due and payable. There would, therefore, be no default in the tenant and

no distress could take place until the end of the first year of the term."

The distress cannot be made until the rent is due: *Mowat v. Clement* (1886) 3 M. R. 586.

### *The Right to Sell the Distress.*

The right to sell goods so distrained was questioned and doubted but not decided in *Nowery v. Connolly*. Killam, C.J., in *Dick v. Winkler* (*supra*), held that the statute 2, W. & M. (1 Sess.) c. 5, [p. 380, *ante*], applied to give the right.

A collection of crop rent cases, of importance only as to facts, will be found in appendix B, at p. 1118, *post*.

## SERVICES AS RENT.

ARTICLE 55.—Where work may be done in satisfaction of rent the contract as to the work is entire, and if not done or not completely done, the landlord may distrain and there can be no allowance for the work done.

[Authorities: *Peacey v. Ovas* (1877) 26 U. C. C. P. 464; *Millmine v. Hart* (1847) 4. U. C. R. 525].

Where work may be done in satisfaction of rent it must be all performed in order to prevent a distress. Under a lease dated 21st December, 1874, for five years, to commence from the 1st April, 1875, the rent of \$80 was to be payable annually on the 1st of June in each year, but subject to a proviso that if the lessee "shall yearly and every year during the said term, or earlier, if he shall think proper, chop, clear and fence in a proper manner six acres of the said land, then the current year's rent shall be considered as paid and satisfied." The rent was not paid on the 1st of June, and the lessee having then three acres cleared, the lessor distrained, and the distress was held legal, for the whole six acres had not been cleared before the rent accrued due: *Peacey v. Ovas* (*supra*).

A landlord agreed with his tenant that if he should not paint the tavern outside and the sheds and driving house in 1842, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint, and the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the buildings on the 12th July, 1845, when the landlord distrained for the quarter's rent due on the 1st of July, 1845. It was held that the contract as to the work was entire, and there could be no allowance until it was finished; that therefore the distress was legal though the value of the work done exceeded the quarter's rent: *Millmine v. Hart* (*supra*).

As to rent payable by services: see p. 268, *ante*.

### FURNISHED APARTMENTS.

ARTICLE 56. — Where furnished apartments are leased, the rent is deemed to issue out of the realty and not out of the furniture, and may be distrained for.

[Authorities: *Newman v. Anderton* (1806) 2 Bos. & P. N. R. 224].

See the notes to Article 33, at p. 255, *ante*.

A sum of money payable periodically for the use of chattels is not rent in any legal sense of the word, and cannot be distrained for. Rent must not only issue out of land, but it must be fixed, definite and certain in amount, whether payable in money, chattels or labour. If, therefore, a lease so mixes the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels, and how much is the profit of land, there can be no distress for non-payment of it.

### RENT CHARGE: RENT SECK.

ARTICLE 57.—A rent charge or rent seck may be distrained for, and by one who has not the reversion,

as for instance the assignee of the landlord with power of distress, and where the assignee of rent gives the tenant notice he is, under the 4 Anne; c. 16, ss. 9, 10, entitled to distrain whether the tenant attorns or not, but if the tenant attorns no notice would be required.

[Authorities: 4 Geo. II. c. 28, s. 5; *Hope v. White* (1867) 17 U. C. C. P. 52; 18 U. C. C. P. 431; (1869) 19 U. C. C. P. 479; R. S. O. 1914, c. 155, s. 39; Sask. (1919), 9, Geo. V., c. 79, s. 19, R. S. B. C. (1911), c. 126, s. 8].

See Article 33 for definitions of "rent charge" and "rent seck" and *Harpelle v. Carroll* (*infra*).

A company executed an assignment to a bank of "all the debts, accounts and moneys due or accruing due or that may hereafter at any time be due. . . And also all contracts, securities, bills, notes and other documents now held . . in respect of the said debts, etc." The only debt due the company was for rent under a lease. The Appellate Division held that even if the rent passed by the assignment it did so as an ordinary debt and not as rent: that the assignment to be within the 4 Geo. II. c. 28, s. 5, should have been a document specifically assigning the rent *quâ* rents and a distress by the Bank was ineffective as against the liquidators of the company. *In re Companies Winding-up Ordinance: In re Edmonton Law Stationers* [1919] 2 W. W. R. 869 (Hyndman, J.) [1919] 3 W. W. R. 406 (Alta.).

In *Harpelle v. Carroll* (referred to at p. 3), Meredith, C.J., discussed the provisions of the Ontario Statute which provides that the relation of landlord and tenant shall be deemed to be founded on contract and not upon tenure or service and said, in answer to the argument that there was no right of distress unless given by the contract—"Such an agreement as the Statute mentions, if there were no reversion in the lessor, made the rent reserved, I take it, rent seck; and though there was at common law no right of distress for that species of rent, the right was given by 4 Geo. II., c. 28, s. 5 . . . I am inclined to think . . that the section, instead of



curtailing, has enlarged the right of distress by extending it to all cases in which there is an agreement of the nature mentioned in it. . . ." (p. 249).

See *West v. Lee Soon and Lee Shun* (1916) 9 W. W. R. 644; 32 W. L. R. 961 [Sask. Ct. en B.].

## RENT IN ADVANCE.

ARTICLE 58.—Where rent is made payable from quarter to quarter or otherwise in advance, a distress may be made or action maintained for such rent as soon as it becomes payable, according to the terms of the demise.

[Authorities: *Jenner v. Clegg* (1832) 1 Moo. & R. 213; *Lee v. Smith* (1854) 8 Exch. 662].

Rent may be payable in advance: Art. 39.

This rule applies in the case of a tenant in possession under an agreement for a lease (see Article 9) or a parol lease required to be in writing (see Article 11) if the tenant has paid rent: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 (C. A.).

Where rent is "payable quarterly on the usual quarter days and always if required in advance," this makes the rent payable in advance; but the landlord cannot distrain without a prior demand, which may be made at any time during the quarter, and he is not bound to wait a reasonable time after demand when the goods of the tenant are seized and about to be sold under a bill of sale: *London & W. L. & D. Co. v. London & N. W. Co.* [1893] 2 Q. B. 49; 62 L. J. Q. B. 370.

### *According to the Terms of the Demise.*

A lease may provide that on removal by the tenant the whole rent shall become due and collectible by distress. Where a lease so provided, and on the 31st of October the tenant proceeded to sell and dispose of all the goods on the demised premises with the intention of finally quitting the place before the 21st of November following; it was held that the current year's rent

became due and in arrear, and a distress therefor might be legally made, though the clause did not prohibit every removal: *Young v. Smith* (1879) 29 U. C. C. P. 109; *Griffith v. Brown* (1871) 21 U. C. C. P. 12, and *Re Hoskins* (1877) 1 A. R. 379, distinguished.

Leave and license to re-enter contrary to the terms of a lease must be under seal. Where a document which purported to give a right to distrain for rent before it became due was not sealed at the time of its execution and no consideration was shown, it was held to be *nudum pactum*, and that the distrainor could not justify under it: *Brayfield v. Cardiff* (1893) 9 M. R. 302.

### *Acceleration Clauses.*

Leases frequently provide that upon certain named breaches or defaults on the part of the lessee the next accruing instalment of rent and usually other instalments to accrue in the future shall immediately become due and may be distrained for.

In *Choderker v. Harrison* (1911) 20 M. R. 727 [C.A.—Robson, J.] 15 W. L. R. 687: it was held that a lessee who had sold his lease and business as a going concern to C. who went into possession and paid rent although no consent (required by the lease) to the assignment of the lease was given—had not abandoned the premises so as to permit the application of the acceleration clause. It was also held that seizure of the goods of C. under a warrant of distress for one month's arrears of rent was not, in this case, a seizure or taking in execution of L.'s goods so that a distress might later be made for three months' accelerated rent.

In *Stanley v. Willis* (1914) 24 M. R. 192; 6 W. W. R. 498; 27 W. L. R. 79 [Man. C. A.], discussed at p. 420, there had been a breach which would have accelerated the rent but the landlord elected to forfeit which deprived him of his right to distrain. Cameron, J.A., said, p. 502, that even if there was a license to distrain—allowing a distress after the forfeiture, "this particular provision of the lease prescribing the payment of a fixed amount as

a uniform sum to be paid in the event of non-compliance by the lessee with covenants of varying importance and character must be held as imposing a penalty. I refer to Lord Watson's *dictum* in *Elphinstone v. Monkland Iron and Coal Co.* (1886) 11 A. C. 332, at p. 342, and to the observations of Lord Esher, M.R., and A. L. Smith, L.J., in *Willson v. Love* [1896] 1 Q. B. 626; 65 L.J.Q.B. 474. But in this view of the contract the lessor could recover merely for the damages actually sustained."

Acceleration clauses going into effect upon an assignment for the benefit of creditors are discussed at p. 404.

See also *Sawyer-Massey Co. v. White; Wachter v. White; Turnbull & Erratt* (1915) 30 W. L. R. 873; 7 W. W. R. 671; 8 W. W. R. 493; 21 D. L. R. 454, discussed at p. 522, *post*; and *Alderson v. Watson*, noted at p. 404, *post*.

It should be observed that the Manitoba Distress Act, R. S. M. 1913, c. 55, s. 3, provides that, "no person shall be at liberty . . . to distrain as against the tenant or any other person, for more than 3 months' arrears of rent where the same is payable quarterly or more frequently, nor for more than one year's arrears where the same is payable less frequently than quarterly."

*Jarvis v. Hall* (1912) 4 O. W. N. 232; 23 O. W. R. 282; 8 D. L. R. 412, was the case of a lease providing that should the tenant's goods be seized and taken in execution, the next ensuing year's rent should immediately become due and payable. The landlord who had a judgment in one Division Court issued a transcript to the Court within the limits of which the tenant resided and caused a seizure to be made under it. Then he issued his warrant for the current year's rent and seized. The tenant brought an action for illegal seizure and recovered damages.

## EFFECT OF WINDING-UP—BANKRUPTCY.

ARTICLE 59.—The winding-up of a company under the Dominion Winding-up Act, R. S. C. 1906, c. 144, commences from the time of the service of the petition, and any distress made by a landlord upon the

goods of the company after the making of the winding-up order is void.

[Authorities: *In re Oak Pitts Colliery Co.* (1882), 21 Ch. D. 322, 51 L. J. (Ch.) 768.

The Winding-up Act contains the following provisions:—

[5] The winding up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding up.

[22] After the winding-up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court imposes.

[23] Every attachment, sequestration, *distress* or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.

[84] 1. No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt or of the interest thereon by the issue or delivery to the sheriff of any writ of execution or by levying or seizing under such writ the effects or estate of the company.

2. No lien, claim or privilege shall be created upon the real or personal property of the company or upon debts due or accruing due to the company by the filing or registering of any memorial or minutes of judgment or by the issue or making of any judgment or garnishee order or other process or proceeding, if before the payment offered to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, judgment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced, provided that this section shall not effect any lien or privilege for costs which the plaintiff possesses under the law of the province under which such writ, judgment, garnishee order or other process or proceeding was issued.

It has been held that s. 84 applies only to "judicial" proceedings.

"I think a distress for rent is not included in the expression 'other process or proceeding,' that being confined by the *ejusdem generis* rule, in my opinion, to process issuing from or proceedings taken in a court, or at all events some judicial or quasi-judicial tribunal. The act of distraining on behalf of a landlord is his individual act. The fact of the rent being owing, of itself, creates no lien; the lien is created only by distress"—per Beck, J., in *Re Jasper Liquor Co., Ltd.* (1915) 9 W. W. R. 6, 364; 22 W. L. R. 727; 25 D. L. R. 84, at p. 7; approved in *National Trust Co. v. Leeson* (1916) 9 W. W. R. 1132, 9 Alta. L. R. 245; 33 W. L. R. 587; 26 D. L. R. 422 [App. Div.]: and in *Imperial Canadian Trust Co. v. Potter* [1917] 2 W. W. R. 128; 11 Alta. L. R. 83 (*Re City Transfer Co., Ltd.*), 34 D. L. R. 457; *Re Shirleys, Ltd.* (1916) 10 W. W. R. 919; [Sask.] [Newlands, J.] distinguishing *Fuches v. Hamilton Tribune Co.* (1885) 10 P. R. 409 (Boyd, C.).

In *Re Shirleys, Limited*, Newlands, J., held that where a distress has been properly levied by a landlord upon the goods of a company, a subsequent commencement of winding-up proceedings will not operate to prevent the landlord from realizing upon the goods. But in that case the distress was stayed and the goods sold by order of a judge—all the rights of the landlord being reserved—and the matter came up by way of an application to pay out the proceeds of the sale.

*Re Diamond Machine Screw Co.* (1910) 30 C. L. T. 365, was the case of a distress for taxes after a winding-up order was made.

In *Mayor of Hastings v. Letton* [1908] 1 K. B. (1907) 23 T. L. R. 456, 27, C. L. T. 432, it was held that the term of a corporation lessee came to an end when the company was wound up and sureties for the payment of rent were not liable for subsequent rent.

A company was tenant of premises at a yearly rent payable in advance. The lessor distrained before the commencement of the winding up of the company for a

year's rent in advance that had accrued due. Neville, J., upheld the distress, saying: "This motion raises a question of some importance, in connection with the winding up of companies. It is whether the principle applicable to a distress for rent levied after the commencement of the winding up when the rent is payable in advance, ought to be applied to a distress for rent payable in advance levied before the commencement of the winding-up. . . . In the absence of authority I do not feel justified in holding that the rent being payable in advance is a fact that makes it inevitable for a landlord to proceed with the distress levied for the rent before the commencement of the winding-up." His decision was affirmed by the Court of Appeal: *Venner's Electrical Cooking and Heating Appliances v. Thorpe* [1915] 2 Ch. 404; 84 L. J. (Ch.) 925; 36 C. L. T. 133; and see *London and Devon Biscuit Co.* (1871) L. R. 12, Eq. 190.

An incorporated company tenant assigned 28th December, 1914. A notice of presentation of a petition to wind it up was served 31st December, 1914. It was held no distress was needed to create the statutory preferential lien which arose by virtue of the Landlord and Tenant Act [see p. 400, *post*] upon the execution by the tenant of the assignment. Boyd, C., considered ss. 5, 23 and 133 of the Winding-up Act and said (p. 254), "That preferential lien existed, I think, *quoad* the particular goods which afterwards became vested in the liquidator. . . . The goods became subject to the Winding-up Order charged with the preferential lien as to the limited amount of rent; and if any order of the Court is required to make that lien available, it should be granted *nunc pro tunc*. . . . The great distinction between the present case and *Fuches v. Hamilton Tribune Co.* (1884) 10 P. R. 509 is, that there the claim was by a landlord who had not distrained before the winding-up proceedings, but here the fact of the voluntary assignment intervened, which operated as a statutory lien in favour of the landlord, despite the absence of a distress." *Re Fashion Shop Co.* (1915) 33 O. L. R. 253 [Boyd, C.].

The landlord is entitled to be paid in full his rent for the premises subsequent to the date of the winding-up order if the liquidator has retained possession for the purposes of the liquidation and with a view to realization of the assets of the company to better advantage, for the rent is then considered to be one of the expenses of the winding-up and must be paid in full like any other debt properly incurred by the liquidator: *In re Oak Pitts Colliery Co.* (*supra*), *In re Lundy Granite Co. ex parte Heaven* (1871) L. R. 6, Ch. 462; 40 L. J. (Ch.) 558; *In re Brown, Bailey and Dixon Lim.* (1881), L.R. 18 Ch. D. 649; 50 L. J. (Ch.) 738; and the landlord is also entitled to receive out of the assets the amount required to put the premises in the repair required by the covenant in the lease: *In re Levi & Co. Lim.* (1919), 88 L. J. (Ch.) 233, and the principle applies to other outgoings in connection with the property: *In re National Arms and Ammunition Co.* (1885), 54 L. J. (Ch.) 673; 28 Ch. D. 474; *In re Silkstone and Dodsworth Coal & Iron Co.* (1881), 50 L. J. Ch. 444; 17 Ch. D. 158; *Hand v. Blow* [1901] 2 Ch. 721; 70 L. J. (Ch.) 687.

If the liquidator refuse to pay this rent, the landlord may apply for liberty to distrain and the Court will give him such liberty or direct the payment of the rent in full: *Re Lundy Granite Co.* (*supra*); *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661.

But if rent is due at the date of the winding-up order, and the liquidator retains possession, although the landlord may with leave distrain for the rent due subsequent to the winding-up order, he will not be permitted to distrain for the rent due prior to the winding-up order. *Re South Kensington* (1881) 17 Ch. D. 161.

If there is an acceleration clause in a lease, the landlord may prove for the future rent reserved if he accepts a surrender of the lease: *Hardy v. Fothergill* (1888) 13 A. C. 351; *In re Panther Lead Co.* [1896] 1 Ch. 978.

A landlord who has exercised his right of distress before the winding up is a secured creditor: *Thomas v. Patent Lionite* (1881) 17 Ch. D. 250.

*The Effect of Winding up Under the Various Provincial Acts.*

*Alberta.*

The effect of the Companies Winding-up Ordinance, 1903, Cap. 115, s. 7 (2) is to destroy a landlord's right of distress and any right to preferential treatment by the Court in regard to rent accrued before the winding-up resolution if the landlord being a creditor can prove in the winding-up: *Imperial Canadian Trust Co. v. Potter* [1917] 2 W. W. R. 128; 11 Alta. L. R. 83 [App. Div.].

It was, apparently, thought that the effect of the decision of the Appellate Division in *Re Jasper Liquor Company, Ltd.* (1915) 9 Alta. L. R. 199; 9 W. W. R. 364; 32 W. L. R. 727; 25 D. L. R. 84, was that a landlord might, after winding-up proceedings had been commenced, obtain the leave of the Court to distrain, but as Beck, J., whose judgment was affirmed, points out (p. 138) in *Imperial Canadian Trust Co. v. Potter* (*supra*), that expression was unnecessary to the decision, and all that the Jasper case decided was that a distress made after the commencement of the proceedings and without leave was void.

In *Re Calgary Furniture Store, Ltd.* (1915) 9 W. W. R. 1 (Stuart, J.), was reversed by *Re Jasper Liquor Co., Ltd.* (*supra*) affirming Beck, J. (1915) 9 W. W. R. 6; 32 W. L. R. 213; 23 D. L. R. 41, and these cases must all be read as explained by *Imperial Canadian Trust Co. v. Potter* (*supra*). See also *National Trust Co. v. Leeson* (1916) 9 W. W. R. 1132 [App. Div.].

Even where the landlord has a right to preferential treatment, no order permitting a distress should be made. A remedy can be obtained only upon summary application to the Court for a direction to the liquidator to allow a preferential claim to the landlord out of the proceeds of the goods which would have been subject to the distress. *Ibid.*



*The Bankruptcy Act of 1919.*

The Bankruptcy Act (1919) 9-10 Geo. V., c. 36 [Can.] has the following provisions:—

52. (1) Where the bankrupt or authorized assignor is a tenant having goods or chattels on which the landlord has distrained or would be entitled to distrain for rent, the right of the landlord to distrain or realize his rent by distress shall cease from and after the date of the receiving order or authorized assignment and the trustee shall be entitled to immediate possession of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any.

(2) The landlord may prove as a general creditor for (i) all surplus rent accrued due at the date of said receiving order or assignment; and, (ii) any accelerated rent to which he may be entitled under his lease not exceeding an amount equal to three months' rent.

(3) Except as aforesaid the landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.

(4) In the case of continued occupation by the trustee of the leased premises for the purposes of the trust estate any payment of accelerated rent made to the landlord shall be credited to the occupation of the trustee.

(5) Notwithstanding any provision or stipulation in any lease or agreement where a receiving order or an authorized assignment has been made, the trustee may, within one month from the date of any such receiving order or assignment, by notice in writing signed by him

given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unprovided term of any lease under which such premises were held or for such terms of the lease and subject to payment of the rent therefor provided by such lease or agreement, or he may disclaim the lease or agreement. Should the trustee not give such notice within the time hereinbefore provided, he shall be deemed to have disclaimed the lease or agreement.

(6) If the trustee so elects to retain such premises for such unexpired term or portion thereof and the provisions of the lease do not preclude the lessee from assigning the term or subletting the premises the trustee shall have power to assign or sublet for the unexpired term.

The entry into possession of the premises by the trustee during the said period of one month shall not be deemed to be evidence of an intention on the part of the trustee to elect to retain the premises nor affect his right to disclaim the lease or agreement.

#### EFFECT OF ASSIGNMENT.

ARTICLE 60.—An assignment for the benefit of creditors under the various provincial Acts, except in the case of British Columbia, does not take away the landlord's common law right of distress.

[Authorities: *infra: passim*].

#### *The Law Prior to 1875.*

The Dominion Insolvent Act of 1869 did not take away the landlord's common law remedy of distress: *McLeod v. McGuirk* (1874) 15 N. B. R. 248; *McEdwards v. McLean* (1881) 43 U. C. R. 454.

A landlord distrained for six months' rent while the goods were in the tenant's possession, and afterwards while the goods were in the hands of the bailiff an attachment in insolvency issued against the tenant. There

being nothing in the Insolvent Act then in force taking away the landlord's right of distress, it was held that the assignee in insolvency was not entitled to the goods without paying or tendering the rent, and that not having done so the landlord was entitled to proceed and sell: *Mason v. Hamilton* (1872) 22 U. C. C. P. 411, distinguished; *McEdwards v. McLean* (*supra*).

And see *In re Kennedy* (1875) 36 U. C. R. 471, and *Langley v. Meir*, *post*, p. 402.

### *The Law from 1869 to 1875.*

"The Dominion Insolvents Act (1875) was framed with a view to the state of the law in Quebec, and was found very difficult of application to the laws of the other provinces": (1883) 3 C. L. T. 558, at 563: an article discussing the proposed Bankruptcy Bill, which did not pass, and see p. 400, *post*.

By the Insolvents Act of 1875 the right of distress was, in Ontario, held to have been taken away: sec. 125 of the latter Act "was interpreted as prohibiting the landlord from levying a distress upon the goods of the insolvent after they had come into the possession of the assignee, and in lieu of such remedy, as entitling him to have his lien made effective by an order of the Court. In such a case the estate was in the custody of the law," per Mulock, C.J., in *Miller v. Tew* (1909) 20 O. L. R. 77, 1 O. W. N. 269, 14 O. W. R. 207, 1173 [Div. Ct.] at p. 77, referring to *In re McCracken* (1879) 4 A. R. 486, and distinguishing it as decided under the above named Acts.

*In re McCracken* and *In re Hoskins* (1877) 1 A. R. 379, were decided under this Act.

### *The Law Since 1880.*

The Insolvents Act of 1875 was repealed in 1880 and the various provinces passed Acts permitting assignments for the benefit of creditors.

"There is nothing in the provisions of the Acts relating to assignments for the benefit of creditors which

at all interferes with the landlord's right to distrain for his rent except only as regards the *quantum* . . .," per Street, J., in *Lazier v. Henderson* (1898) 29 O. R. 673 [Div. Ct.], at p. 678; 18 Occ. N. 358.

When the Insolvents Act was repealed and the Ontario Assignment Act became applicable provision to cover such cases was made by a section in the Landlord and Tenant Act which remains in the R. S. O. 1914 c. 155, as s. 38 (1) in practically the same form. It reads as follows:—

"38 (1) In the case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding [and for three months following] the execution of the assignment, and from thence so long as the assignee retains possession of the premises."

The words in brackets were new in 1895 by 58 Vic. c. 26, s. 3.

The Saskatchewan Act of 1919, 9 Geo. V., c. 79, has copied this provision—section 52.

The meaning of the section has been a matter of considerable dispute as will be seen by a consideration of the cases noted below.

### *"Preferential Lien Defined."*

"The expression 'the preferential lien of the landlord for rent' is borrowed from the Insolvent Acts of 1869 and 1875 . . . The circumstances under which the same expression is used [in sec. 34, c. 170, R. S. O. 1897—now R. S. O. 1914, c. 155, s. 38 (1)] are so widely different that without a compelling context it would be impossible to deduce the same result [as in *Re McCracken*,—*ante*] notwithstanding the absolute identity of the expression made use of": per Street, J., in *Lazier v. Henderson* (*ante*), at p. 678.

"Although expressly limited to Upper Canada, the phraseology was doubtless to be credited to a Lower Canadian source, as was suggested by Patterson, J.A., in

*Re Hoskins and Hawkey* (1877) 1 A. R. 379. But though the same words were used I agree with Street, J., in *Lazier v. Henderson* (*supra*) that they are not necessarily to be given the same interpretation": Magee, J.A., in *Alderson v. Watson* (1916) 35 O. L. R. 564, at p. 583, and see (1883) 3 C. L. T. 558, at p. 563.

The words have also been defined in *Mason v. Hamilton* (1872) 22 U. C. C. P. 190; *Re McCracken* (1879) 4 A. R. 486, and these definitions were considered by Mulock, C.J.Ex.D., in *Miller v. Tew* (1909) 20 O. L. R. 77 [Div. Ct.), where it was held that the landlord had no "preferential lien" on the insurance money paid to the assignee for goods destroyed by fire two days after the assignment, although he could have made the whole rent due by distress at or before the date of the assignment, and Mulock, C.J., said, p. 85, "It appears to me that the intention of the sub-section was merely to limit the amount of rent in respect of which the landlord should retain his lien and not to enlarge his right by entitling him to resort to property not distrainable by him."

"The phrase . . . means, as construed by decisions binding on me, that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section: *Lazier v. Henderson*; *Tew v. Toronto Savings and Loan Co.* (1898) 30 O. R. 76": per Boyd, C., in *Re Fashion Shop Co.* (1915) 33 O. L. R. 253.

But the Assignments Act [R. S. O. 1914 c. 134] does not expressly take away the right of distress—which the landlord may exercise after an assignment—and the goods assigned are not *in custodia legis*: *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, per Osler, J.A., at p. 346, followed in *Miller v. Tew* (*supra*); *Eacrett v. Kent* (1888) 15 O. R. 9; *Alderson v. Watson* (1916) 35 O. L. R. 564 [App. Div.].

A claim for damages for breach of a covenant to repair for which the lessor has not obtained judgment is not a claim which can be treated as rent and as a preferential claim: *Cristall v. Loney and MacKinnon* (1916) 9 W. W. R., 1205 [Alta.—Ives, J.].

### *The Right of Distress.*

The landlord may exercise his right of distress notwithstanding an assignment for the benefit of his creditors.

*Linton v. Imperial Hotel Co.* (ante); *Miller v. Tew* (ante); *Lazier v. Henderson* (ante).

### *The Quantum of the Distress.*

#### *During the Period of One Year next Preceding.*

“The landlord’s right to distrain, apart from this statute . . . , subsisted for arrears due for six years, and it became a very serious consideration, therefore, where a tenant became insolvent whether his landlord should be allowed to permit his rent to run in arrear and thereby to establish a preferential lien for large arrears to the prejudice of his other creditors, and the Legislature in the earlier enactment provided (as I think to prevent this apparent injustice) that in case of an assignment for the benefit of creditors this right or preferential lien, as it is called, should be restricted to the arrears of rent due during the period of one year last previous to the execution of such assignment, and from thence so long as the assignee should retain the premises leased. That is, it restricted the right to distrain for arrears, but did not interfere with the ordinary right of the landlord so long as the assignee remained in possession”; per Burton, C.J.O., in *Langley v. Meir* (1898) 25 A. R. 372, at p. 376; 18 Occ. N. 287.

“The period of one year last previous to.” These were the words originally used. See R. S. O. 1897 c. 170, s. 34 (1)—and were the words considered in *Semi-Ready, Ltd. v. Tew* (1909) 19 O. L. R. 227; 13 O. W. R. 476, 14 O. W. R. 393, 576 [Div. Ct.].

#### *For Three Months Following the Execution of the Assignment.*

“But landlords had long provided by agreement with their tenants for the acceleration of their rent in the

event of an assignment for the benefit of creditors, and this practice, like the accumulation of arrears, was liable to abuse, and this, no doubt, led to the passing of the 58 Vic. c. 26 (O.) [1895] by which the preferential lien is again restricted as far as the amount payable under an acceleration clause in case of an assignment is concerned, and there is the prohibition of an agreement to accelerate the rent becoming due for a longer period than three months," per Burton, C.J.O., in *Langley v. Meir* (*ante*), and see the remarks of the same Judge immediately preceding the above, quoted at p. 402 of the text.

*Langley v. Meir* (*supra*) held the provision to be restrictive, limiting the landlord's right, even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and it does not give to the landlord an absolute right to three months' rent upon an assignment, this disapproving *Clark v. Reid* (1896) 27 O. R. 618, which held that under the Act the landlord is entitled to three months' additional rent whether the assignee keeps possession so long or not.

*Lazier v. Henderson* (*ante*) was decided at the same time by a Divisional Court [see 29 O. R. at p. 679]; it was held that the expression "arrears of rent due . . . for three months following the execution of such assignment," in s. 34 of the Landlord and Tenant's Act, R. S. O. c. 170, mean "arrears of rent becoming due during the three months following the execution of such assignment"; and the landlord was, therefore, apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment.

*Tew v. Toronto Savings and Loan Co.* (1898) 30 O. R. 76, followed *Lazier v. Henderson*, and see *Semi-Ready, Ltd. v. Tew* (1909) 19 O. L. R. 227 [Div. Ct.]. In this connection attention should be given to the provisions of the Manitoba Distress Act noted at p. 391, *ante*, limiting the amount of distress.

*The Acceleration Clause as a Fraud on the Assignments Act.*

The clause in the lease in *Alderson v. Watson* (1916) 35 O. L. R. 564 (App. Div.] 9 O. W. N. 90, 435, provided that if the tenant made a chattel mortgage "the then current year's as well as the next ensuing year's rent should become due and payable."

Meredith, C.J.O. (pp. 577-8), was of the opinion that it was a fraud upon the Act, following *In re Hoskins and Hawkey* (1877) 1 A. R. 379, and the opinion of Armour, J., in *Baker v. Atkinson* (1886) 11 O. R. 735, 752.

Garrow, J.A. (pp. 569 and 570) said that this argument would have been an effectual answer in *Linton v. Imperial Hotel Co.* and *Langley v. Meir*, "in both of which Hoskin's case was cited, but evidently not followed." He referred to *Baker v. Atkinson* and held he was not bound to follow *Re Hoskins and Hawkey* under the circumstances, and said (p. 570): "The real difficulty in the way of an easy construction of the statutory provision arises, it seems to me largely from placing too much stress upon the word 'during,' as if the right of distress existed in respect of any and all rent which was due and owing during the year next preceding the assignment. But for the statute, the landlord might distrain for up to six years' arrears. The right to distrain is not taken away, but the lien, as it is called, is, in my opinion, reduced to one year's rent if so much or more is owing, that is, that not more than one year's arrears prior to the assignment, whether actual, or accelerated as in this case can now be claimed."

Maclaren, J.A., concurred; Magee, J.A., considered himself bound by *Linton v. Imperial Hotel*, and Hodgins, J.A., preferred the view of the majority of the Court in *Langley v. Meir*.

In *McKinnon et al. v. Cohen* (1914) 5 W. W. R. 1263: 26 W. L. R. 828 [Beck, J.—Alta.], it was held that a clause in a lease by which three months' rent was immediately to become due and payable in the event of the lessee transferring his interest or any portion of his



interest in the goods and chattels on the demised premises was a fraud upon the Assignments Act and invalid against an intervening assignee under that Act, Beck, J., following *In re Hoskins and Hawkey* (*supra*).

*McKinnon v. Cohen* was followed by Ives, J., in *Cristall v. Loney and MacKinnon* (1916) 9 W. W. R. 1205 [Alta.] 33 W. L. R. 563.

In Saskatchewan, however, Brown, J., in *Harwood v. The Assiniboia Trust Co.* (1915) 8 W. W. R. 565, distinguished *McKinnon v. Cohen* (*supra*), and held such a stipulation valid, referring to *Langley v. Meir* (*supra*), and pointing out that the Saskatchewan Act—which came into force in 1914—was similar to that of Ontario.

The section appears as s. 52 in the new Act of 1919.

### “*The Execution of the Assignment.*”

Where a deed of assignment was signed and sealed on the day a month's rent in advance was due but not delivered until the following day or actually completed until the day next after that, it was held (the month's rent not having been paid) that rent was in arrear at the first moment of time of the day after the gale day—that there were arrears when the deed was “executed” and the landlord was entitled to a preferential lien for four months' rent: *Re Metropolitan Theatres Limited (Magee Real Estate Co., Ltd.'s Claim)* (1917) 40 O. L. R. 345 [Rose, J.].

### *The Tenancies Affected.*

“The statute does not apply to the case of a monthly tenancy, *i.e.*, from month to month, but to a case where there is a term existing of at least yearly duration”—per Boyd, C., in *Semi-Ready, Limited v. Tew* (1909) 19 O. L. R. 227 [Div. Ct.] at p. 232.

### *Right of Assignee to Retain Possession for the Remainder of the Term.*

The R. S. O. 1914, c. 155, s. 38 (2) provides:—

“Notwithstanding any provision, stipulation or agreement in any lease, or agreement in case of an

assignment for the general benefit of creditors, or of an order being made for the winding up of an incorporated company, the assignee or liquidator may, within one month from the execution of the assignment or the making of the winding-up order, by notice in writing signed by him, given to the landlord, elect to retain the premises occupied by the assignor or company at the time of the assignment or winding up order for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit upon the terms of the lease, and subject to payment of the rent therefor provided by such lease or agreement."

The provision was copied in the Saskatchewan Act of 1919: (9 Geo. V., c. 79) as s. 53 (1) which also added s. 53 (2) as follows:

"The entering into possession of the premises by the assignee during the said period of one month shall not be deemed to be evidence of an intention on the part of the assignee to elect to retain the premises nor affect his right to disclaim the lease or agreement—"

"The Saskatchewan Act also provides by s. 54 that 'The landlord of premises occupied by the assignor in carrying on his business at the date of the assignment shall not distrain upon the goods of the assignor after they have become vested in the assignee, and all goods so distrained upon shall, on demand, be delivered by the person holding the same to the assignee—' and see (1917) 7 Geo. V., c. 34, s. 19 (3) [Sask.]

The effect of . . . R. S. O. 1897 c. 170, s. 34, now s. 38 (2), is to place the assignee who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment for the unexpired term of the lease under which said premises were held in the same position as respects the lease as the assignor would have been in had the assignment not been made, the landlord in such case being entitled to the full amount of the rent secured by the lease, but to nothing more": per Armour, C.J.O., in *Kennedy v. MacDonald* (1901) 1 O. L. R. 250, 21 C. L. T. 233 (Div. Ct.). The landlord ineffectively claimed that he was entitled to the

3 months' rent in advance provided for by the lease as a penalty payable by the tenant for the assignment, and if the assignee chose to elect he must practically take a new lease, such lease to commence from the date of the assignment and to become payable by the assignee from that date.

*"Or for Such Portion as he Shall See Fit."*

See *Tew v. Routley* (1900) 31 O. R. 358, per *Armour*, C.P., at p. 365, 20 C. L. T. 36.

*Forfeiture of the Term.*

See pp. 660 and 702.

*The Position of the Assignee on the Assignment.*

The question has been raised—but not settled—as to whether an assignee is so vested with the property of the assignor by the assignment that he remains liable to the landlord without any act of acceptance on his part.

The question appears to raise a distinction between an "official assignee"—that is, an officer appointed by a provincial statute to whom assignors are bound to make an assignment or who is bound to act under any assignment made to him, no matter by whom made—and an assignee selected by and usually acting at the request of the assignor.

The matter came before Ives, J., in *North-West Theatre Co. v. MacKinnon* (1915) 8 W. W. R. 237: 30 W. L. R. 897 (Alta.), where he held that an assignee who enters without clearly disclaiming the lease accepts it and becomes personally bound by the covenants, adding "I am not so sure of his liability if he does not enter into possession and it may be that in such case no disclaimer would be required." He did not, however, discuss the question as to the defendant being the "official assignee" under the Alberta Act, and gave a personal judgment against the assignee.

The Appellate Division [*ib.* 691], 8 Alta. L. R. 226, 31 W. L. R. 226, reversed this decision, holding that the operation of the Act vesting a term of years in an *official assignee* is suspended until the assignee does some act signifying his acceptance of it. Beck, J., giving the judgment of the Court, saying (696), “whether or not this . . . applies to a voluntary assignment for the benefit of creditors to an assignee of the debtor’s choice, as *Carter v. Warne* (1830) 4 C. & P. 191, seems to hold, it does, I think, apply to an assignment under the Assignments Act made to an official assignee who cannot refuse to accept the assignment, and who, if the assignment *per se vests* the lease in him, even against his will, would be made personally liable for the rent for the whole residue of the term whether he has assets sufficient to meet it or not . . . .”

The landlord appealed to the Supreme Court of Canada (1916) 52 S. C. R. 588; 9 W. W. R. 1255, and the appeal was allowed.

Idington and Brodeur, JJ., who dissented, both applied the same reasoning as Beck, J. Idington, J., following *Bourdillon v. Dalton* (1792) Peakes, N. P. Cas. 238, 1 Esp. Cas. 233, and the other cases also considered by Beck, J., and drawing a parallel with the case of executors: Brodeur, J., also said, p. 603 (1265): “If the assignment could be made to anybody else, it may be that the provisions of the common law would still apply and that the assignee could be bound.”

Fitzpatrick, C.J., said, 589 (1256): “The respondent is assignee of the lease. If this had been a profitable holding he could have disposed of it for the benefit of the estate and I do not understand how in the absence of statute the rights of the lessors can be dependent upon whether the lease is valuable in the hands of the official assignee or not. . . . I am disposed to think . . . (he) . . . could have pleaded his quality as official assignee and that his liability would then have been limited to the extent of the assets coming into his hands. This . . . he has not done. . . .”

Duff, J., held he took possession under the lease and did not disclaim, and he indicated his opinion, without deciding, that (1) the assignee could not sever the assignment of the lease from the assignment of the goods, and (2) he could not be allowed to say, when entering for the purpose of realizing upon the goods that he entered in any other right than by the express assignment of the lease: see pp. 598 (1261-1262).

He said, pp. 597, 1261, "He took possession of (the) estate under and by virtue of an instrument which gave him the right to enter upon the premises in question and to occupy them as assignee for a *subsisting lease*; he did enter and contented himself with making an arrangement with the landlord that the landlord should not distrain if he undertook to pay the rent as long as he occupied the premises."

Anglin, J., said, p. 600 (1262): " . . . the vesting of the assigned property takes place without any act of acceptance by the assignee: *Titherton v. Cooper* (1882), 9 Q. B. D. 473, at pp. 483, 487, 490; 51 L. J. Q. B. 472. He becomes and, in the absence of a provision for disclaimer . . . he remains liable to the landlord because of privity of estate with him, for the rent which accrues after the assignment under a lease so vested in him. Of that liability he can relieve himself, either by obtaining a release from the landlord, or, as to the future, by putting an end to the privity of estate: *White v. Hunt* (1870) L. R. 6 Ex. 32; 40 L. J. Ex. 23; *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92; 52 L. J. Q. B. 391."

### *The British Columbia Statute.*

After distress levied by a landlord the tenant assigned for the benefit of his creditors under the provisions of the Creditors' Trust Deeds Act, c. 13 [see s. 55 (1)] R. S. B. C. (1911). Subsequently, H., a creditor of the landlord, served the tenant with a garnishee summons and the tenant handed it to the assignee, the assignee not being a party to the proceedings. In an action brought by another creditor of the landlord a receiver

was appointed of the rents of the premises, and the assignee paid into Court in the first mentioned action the amount of H.'s claim, with the suggestion that it was claimed by the receiver. An issue to determine, as between H. and the receiver, the right to the money so paid in was determined in favor of the receiver. H. appealed.—Held, that the appeal should be dismissed: *Hoyes v. Creery (Fraternal Order of Eagles)* [1918] 1 W. W. R. 873; 24 B. C. R. 505; 39 D. L. R. 516 [B. C.].

Martin, J.A., said, pp. 876, 877:

“Then does the statute assist the plaintiff? As has been seen, the landlord, the Order of Eagles, by s. 55 (6) after having impounded the distress on the premises (under s. 18 of the Distress Act, c. 65, R. S. B. C., preparatory to sale under s. 7) was compelled by the statute to deliver it up to the assignee, receiving in exchange or substitution therefor ‘a privileged claim against the estate of the assignor for arrears of rent.’ Now how does this statutory translation of the pledge of certain goods into a privileged claim against the whole estate for the rent have the effect of depriving the landlord of his right to his rent which he had secured by his distress? The tenant could not under this distress have prevented the landlord from satisfying his pledge, and how does the fact that the manner of satisfaction is changed, prejudicially alter the right of the landlord in the absence of express language conferring a new right upon the tenant? I am quite unable to see how it does. The origin of distress is important historically. In 7 Encyc. of the Laws of England, 673. it is said: ‘A right of distress is essential to rent. Under the feudal law default in rendering service entitled the lord to recover the land let to his tenant by a process of seizure in his own Court, a right which was taken away by Statute 52 Hen. III.; and the right to distrain chattels only is a remnant of, or in substitution for, the original power of forfeiture.’ It would be a mockery indeed to take from a man by Act of Parliament, a right over goods in his hands and, in substitution therefor, give him a privileged claim to the amount of his pledge and yet, at the same time,

prevent him from enforcing it or obtaining the fruits of it. I am clearly of the opinion that in law it cannot be said there is a debt, obligation or liability due by Greene to the Order for the amount of this privileged claim which represents the pledge: the Order cannot maintain an action against Greene till the result of the privileged claim is known, and the plaintiff Hoyes cannot be in a better position than the Order. The garnishment of Greene could not intercept the statutory obligation on the assignee to pay this privileged claim to the Order, and in no sense, I think, does the plaintiff stand in the shoes of the Order. If a 'privileged claim' is conferred by statute upon a landlord it becomes his own right, his property, and how can he be deprived of it by garnishing one who is his debtor? The situation is as though the former debtor had discharged the debt *pro tanto*. There has been a failure in the argument to appreciate the peculiar position the landlord holds under the statute."

### RIGHT TAKEN AWAY.

ARTICLE 61.—Where the right to distrain exists nothing but payment or something equivalent to payment, such as an actual tender of the arrears, or a release under seal, will be sufficient to take it away.

[*Horne v. Lewin* (1697) 1 Ld. Raym. 637].

### *Tender—Before Distress.*

A tender to the landlord or his agent of the full amount of the rent will render any subsequent distress illegal: *Branscomb v. Bridges* (1823) 1 B. & C. 145; *Holland v. Bird* (1833) 10 Bing. 15; *Bennett v. Bayes* (1860) 5 H. & N. 391; 29 L. J. Ex. 224.

Tender after distress: see Article 62.

### *Requisites of a Valid Tender.*

#### *Shewing the Money.*

In order to constitute a legal tender the money must either be produced and shown to the creditor, or its pro-

duction expressly or impliedly dispensed with. Where, to prove a tender of a quarter's rent for which there had been a distress, the evidence showed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is your rent," which he had, and told the landlord he had at his right hand in a desk, but did not produce or show it to the landlord, who said nothing and left the premises; it was held that there was no evidence of tender or dispensation with one: *Matheson v. Kelly* (1874) 24 U. C. C. P. 598.

This case was distinguished in *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476, in which the tenant alleged that he asked the bailiff who had distrained for a bill of demands with all costs, and he would pay him; that he (the tenant) had then \$87 in his hands which was sufficient to pay the rent and costs, and said, "Here is your money," but that the bailiff refused to receive it. The bailiff denied the tenant's allegations, but the jury found them true, and the Court ruled that the tender was sufficient. The real question is the readiness of the tenant to pay his rent, of which the tender is evidence.

### *To the Landlord.*

A tender may be made to the landlord himself, notwithstanding he has instructed a bailiff to distrain, and left the matter in his hands: *Smith v. Goodwin* (1833) 4 B. & Ad. 413.

### *Or His Agent.*

A tender may be made to any agent of the landlord who has express or implied authority to receive rent on his behalf: *Bennett v. Bayes* (1860) 5 H. & N. 391; 29 L. J. Ex. 224.

The person who has authority to distrain has authority to receive the rent, and if before any distress there is a tender to the person thus authorized or to the landlord, though without expenses, a subsequent distress will render all parties concerned therein liable to trespass



or trover: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476; *Bennett v. Bayes* (1860) 5 H. & N. 391; *Hatch v. Hale* (1850) 15 Q. B. 10.

But a tender to a person who is merely left in possession under the distress and has no actual authority to receive the money is bad: *Boulton v. Reynolds* (1859) 2 E. & E. 369.

### *It Must be Unconditional.*

The tender should be made unconditionally, so that the party may accept it without prejudice to his right, if any, to recover more: *Jennings v. Major* (1837) 8 C. & P. 61.

A tender of one quarter's rent, coupled with a demand of a receipt up to a particular day, there being a dispute whether one or two quarters' rent was then due, is not a valid tender: *Finch v. Miller* (1848) 5 C. B. 428.

Requesting a bill of demands, with all costs, for the purpose of payment, does not invalidate a tender: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476, but refusing to part with the money without a receipt does, for that is imposing a condition: *Foord v. Noll* (1842) 2 Dowl. N. S. 617; *Laing v. Meadler* (1834) 1 C. & P. 257.

The demand which must be made on distraining is dealt with in Article 75.

A tender "under protest" is valid, for those words impose no condition: *Manning v. Lunn* (1845) 2 C. & K. 13.

### *Set Off.*

The Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, s. 34 (1), enacts that a tenant may set off against the rent due a debt due him by the landlord. By s. 34 (2) [Form 2] notice of the claim of set off may be given before or after the seizure.

Form 2 is as follows:—

"Take notice that under the Landlord and Tenant Act I wish to set off against rent due by me to you the debt which you owe to me on your promissory note for \_\_\_\_\_, dated \_\_\_\_\_ (or as the case may be).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_."

When the notice is given the landlord shall be entitled to distrain or to proceed with the distress only for the balance of the rent after deducting any debt justly due him by the tenant, which is mentioned in the notice.

### *Similar Legislation.*

Saskatchewan: Landlord and Tenant Act, 1919, 9 Geo. V., c. 79, ss. 26 and 27.

Formerly, and this still applies in provinces where there is no such statute, a set off for an equal or greater amount than the rent in arrear would not prevent a distress: *Absolom v. King* (1743) Bull N. P. 181; *Andrew v. Hancock* (1819) 1 Brod. & B. 46-7; and see *Pratt v. Keith* (1864) 33 L. J. Ch. 528.

Damages to which a lessee may be entitled for a breach of a lessor's covenants to repair and to lease an adjoining piece of ground, though the subject of a counterclaim under the Judicature Acts, will not be a debt within the above statute, so as to be set off against a claim for rent and thus prevent a distress therefor: *Walton v. Henry* (1889) 18 O. R. 620.

## TENDER.

ARTICLE 62.—After distress has been levied, but before impounding, the tenant may prevent the sale of the goods by tendering the arrears and expenses.

### *Tender After Distress but Before Impounding.*

A tender after distress and before impounding must include expenses: *Vertue v. Beasley* (1831) 1 Moo. & R. 21; *Evans v. Elliott* (1836) 5 A. & E. 142.

### *Tender After Impounding but Before Sale.*

A tender after the impounding is bad, because the goods are then in the custody of the law and not of the

landlord: *Ladd v. Thomas* (1840) 12 A. & E. 117; *Six Carpenters' Case* (1610) 8 Co. R. 432; *Tenant v. Field* (1857) 8 E. & B. 336.

Article 76 deals with impounding and as to when goods are *in custodia legis*.

But if a tender be made within the five days allowed to the tenant to replevy [see Art. 84], although after the impounding, a special action on the case founded on the equity of the Statute 2 Wm. & M. Sess. 1 c. 5, s. 2, may be maintained if the landlord afterwards proceed to sell the distress: *Johnson v. Upham* (1859) 2 A. & E. 250; 28 L. J. Q. B. 252.

### TAKING SECURITY FOR RENT.

ARTICLE 63.—Taking security for rent as a bond, bill or note, will not until payment is actually made, operate as a satisfaction of the rent, or take away or even postpone the right of the landlord to distrain.

[Authorities: *Simpson v. Howitt* (1878) 39 U. C. R. 610; *Hope v. White* (1869) 17 U. C. C. P. 52; *McLeod v. Darch* (1857) 7 U. C. C. P. 35; *Colpitts v. McCullough* (1900) 32 N. S. R. 502.]

#### *Taking Security.*

If the landlord expressly take the bond, bill or note in payment, the rule, of course, does not apply.

It is clear that the landlord may for good consideration undertake not to distrain for a certain time or at all: *Green v. Kehoe* (1846) 5 N. B. R. 494; *Wallace v. Fraser* (1878) 2 S. C. R. 522.

Under a distress for rent issued on 12th March the defendant took possession of the plaintiff's store and evicted him. On the 13th March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff, who made the distress, when they informed him that the distress was illegal, and a new one would have to be made, and they then handed him the key of the store and an inventory of

the goods distrained, and tendered him \$17 as damages for the eviction. The bailiff immediately informed him that he had a new demand, and received back the key and they left the store. In an action for illegal distress, it was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found, in answer to a question, that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first. Held, that it should have been specifically left to the jury to say whether what took place, and what was done on the discovery of the mistake made in executing the warrant, and making the distress after sunset, was done with the intention of abandoning the distress. Per McLeod, J., that the evidence and the answers of the jury to the questions submitted showed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal warrant, and the trespass continued as if no second warrant had issued. Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st May, he, the plaintiff, would not distrain for the rent until after default on the 1st April:—Held, that the agreement would have the effect of suspending the right to distrain, and if the defendant in violation of it distrained, he would render himself a trespasser: *Mooers v. Manzer*, (1903) 36 N. B. R. 205.

Where a promissory note was given and accepted for rent due:—Held, that the landlord's remedy by distress was suspended during the currency of the note. Per Meagher, J., that the burden of showing that the note was given for his accommodation, and not for the rent, was upon the defendant, by whom the defence was set up: *Colpitts v. McCullough* (1900) 32 N. S. R. 502.

And see *Armstrong v. Sherlock*, noted at p. 382.

It will thus be seen that the right of distress is not such an inseparable incident of a rent service that it

cannot be postponed. It is clear that the landlord may for good consideration undertake not to distrain for a certain time, or not at all: *Green v. Kehoe* (1846) 5 N. B. R. 494; *Wallace v. Fraser* (1878) 2 S. C. R. 522.

If there be a dispute between landlord and tenant as to the amount of the rent due, and the landlord verbally agrees not to distrain till the amount due is settled by arbitration, he is liable in trespass if he distrains in violation of the agreement: *Preston v. Appleby* (1890) 30 N. B. R. 94. It appeared that the lessee agreed to deliver to H. certain goods to be sold on his account, and to sign an order on H. to pay the proceeds as far as the amount of the rent to the landlord, and if the goods were not sold before the 1st of May then next, that H. should be under the direction of the latter in the matter of sale, in consideration of which he agreed that he would not distrain for the rent in arrear before the 1st of May. The goods were delivered, and H. accepted the order and held the proceeds of the sale to the amount of the rent to the use of the landlord, and it was held to be a question for the jury whether the agreement of the parties was that the right of distraining should be suspended: *Green v. Kehoe* (1846) 5 N. B. R. 494. From an agreement to which the landlord of a farm is privy for a sale by the tenant of some eatage of pasture to a third person, the amount produced by the sale to be paid to the landlord, a contract by him may be inferred not to distrain cattle put on the demised premises to consume the eatage: *Horsford v. Webster* (1835) 1 C. M. & R. 696. But where a person being about to take an apartment from a tenant was promised by the landlord that his property should not be taken so long as he paid the rent to the tenant, it was held that the landlord's right to distrain was not barred unless the rent were actually paid, and that a tender of which the landlord had no notice was not sufficient: *Welsh v. Rose* (1830) 6 Bing. 638.

It is also clear that a landlord may give to a third person a valid undertaking not to distrain on the goods of his tenant. W. let an unfurnished house to one Mrs.

M. to be used as a boarding house Mrs. M. applied to F. & Son for furniture, which they refused to supply unless W. would guarantee that it would not be distrained for rent. W. thereupon signed the following, which was delivered to F. & Son by Mrs. M.: "The bearer, Mrs. M., being about to purchase some furniture from F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by F. & Son for rent that may become due." F. & Son then delivered the furniture to Mrs. M., the said furniture to be paid for by monthly payments, and to "remain the property of F. & Son till paid for in full." It was held that the memo. signed by W. constituted a binding contract or arrangement with F. & Son not to distrain, even although the guarantee received by W. proved worthless: *Wallace v. Fraser* (1878) 2 S. C. R. 522; 11 N. S. R. 337.

An agreement not to distrain is not an agreement concerning an interest in land and need not be in writing: *Giles v. Spencer* (1857) 3 C. B. N. S. 244.

### SURRENDER.

ARTICLE 64.—If the tenant surrender his lease the right of distress is gone.

[*Lewis v. Brooke* (1850) 8 U. C. R. 576; *Coupland v. Maynard* (1810) 12 East 134; *Laur v. White*, 18 U. C. C. P. 99; *Elmsworth v. Price* (1860) 18 U. C. R. 411].

As to Surrender, see Article 108.

### FORFEITURE.

ARTICLE 65.—If a lessor exercise his option that a lease shall be void for breach of covenant and forfeit the lease, he cannot distrain for subsequent rent.

[Authorities: *Baker v. Atkinson* (1886) 11 O. R. 735; 14 A. R. 409; *Griffith v. Brown* (1871) 21 U. C. C. P. 12; *Stanley v. Willis* (1914) 24 M. R. 192 [C. A.] 6 W. W. R.

498; *Linton v. Imperial Hotel* (1889) 16 A. R. 337; *Jones v. Carter* (1845) 15 M. & W. 718; *Sarjeant v. Nash Field* [1903] 2 K. B. 304 19 T. L. R. 510; 23 C. L. T. 260].

Forfeiture: See Article 112.

A lease contained a provision that on the issue of a writ of execution against the lessee, the then current year's rent should immediately become due and payable and the term forfeited. The lessor assigned part of the reversion to W. and part to B. The latter gave information to a creditor of the lessee, in consequence of which he was sued in the Division Court and suffered judgment and execution. B. distrained under the acceleration clause. It appeared that the judgment had been paid before the distress without seizure; but Street, J., held that B. was entitled to distrain, as he had not elected to forfeit the term: *Mitchell v. McCauley* (1893) 20 A. R. 272 11 C. L. T. 325. In this case the Court followed *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, in which it was held that a distress is not an election to forfeit the term, and consequently that there may be a distress where there is no forfeiture. In *Graham v. Long* (1886) 10 O. R. 248, the lease was forfeitable on insolvency, and the full amount of the current yearly rent became at once due and payable. There was insolvency and a distress before the rent would be otherwise due, and it was held that the distress was valid. But this case was not followed in *Baker v. Atkinson* (1886) 11 O. R. 735; 14 A. R. 409; and the rule seems to be that a distress after entry for a forfeiture is bad: *Scott v. Brown* (1884), 51 L. T. 746; W. N. 209.

The cases already referred to in the Ontario Courts were all as between the lessor and the assignee in insolvency of the lessee, and have no application where the question arises directly between landlord and tenant. And where the lease provided that, on the tenant commencing to remove his goods, the then current year's rent should immediately become due, it was held that on such removal the landlord might distrain, though the lease became forfeited and void by force of the proviso: *Young v. Smith* (1879) 29 U. C. C. P. 109; distinguish-

ing *Re Hoskins* (1877), 1 A. R. 379, and *Griffith v. Brown* (1871), 21 U. C. C. P. 12.

If, after bringing an action of ejectment for a forfeiture, the lessor distrain for rent covering the period during which the forfeiture occurred, this will not affect the ejectment, which is equivalent to the ancient entry: *Grimwood v. Moss* (1872) L. R. C. P. 360; 41 L. J. (C. P.) 239. The point whether the issue of a writ dispenses with actual entry was very much discussed, but not decided in *Re Morrish, Ex parte Hart Dyke* (1882) 22 Ch. D. 410 [C. A.]; *Grimwood v. Moss*, however, decides it did and this was followed in *Re Bagshaw and O'Connor*, see p. 725: see also *Denison v. Maitland* (1892) 22 O. R. 171. By issuing and serving a writ of ejectment the claimant elects to treat the defendants therein named as trespassers, and not as tenants, from the day on which possession is claimed in the writ, and he cannot distrain or sue for any subsequent rent, or for use and occupation after that day: *Birch v. Wright* (1786), 1 T. R. 378; *Bridges v. Smith* (1829), 5 Bing. 410; 2 M. & P. 740; *Jones v. Carter* (1845) 15 M. & W. 718; *Franklin v. Carter* (1845) 1 C. B. 750; 3 D. & L. 213; nor for an apportioned part of the current quarter's rent (where the rent is reserved payable quarterly), calculated from the last quarter day to the day on which possession is claimed in the writ: *Oldershaw v. Holt* (1840), 12 A. & E. 590; 3 P. & D. 307; notwithstanding *Clapham v. Draper* (1885), C. & E. 484.

In *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337, a clause in a lease provided that in certain events "the then current year's rent shall immediately become due and payable and may be distrained for, but in other respects the said term shall immediately become forfeited and at an end." It was held that a distress might be made upon a breach as the lessor had not elected to forfeit. The clause was said to be divisible, but Osler, J.A., suggested that a license to distrain was given.

In *Stanley v. Willis* (1814) 6 W. W. R. 498; 24 M. L. 192 [Man.—C. A.] the clause provided for acceleration "and" distress "and" forfeiture. It was held that this



clause was divisible and the landlord having elected to forfeit and re-enter could not distrain—Haggart, J. A., who dissented, thought the “license” justified a seizure.

In *Pigeon v. Preston* (1912) 3 W. W. R. 695 [Sask.—Newlands, J.], it was held that a landlord who gave notice to quit upon learning of a breach and later distrained had not forfeited the lease.

### *The Statute of Anne.*

See Article 49 and notes, p. 362.

## SECOND DISTRESS.

ARTICLE 66.—A second distress for the same rent can only be made if the first distress prove insufficient—with certain exceptions it cannot be made if the first distress be abandoned.

[Authorities: *McDonald v. Fraser* (1904) 14 M. R. 582; [C. A.] 24 Occ. N. 101].

### *For the Same Rent.*

After a distress for one month's rent it is not illegal to make another distress for the next month's rent although it was due and in arrears at the time of the first distress: *McDonald v. Fraser* (*supra*). See as to splitting the entire rent: *Owens v. Wynne* (*post*).

### *If the First Distress Prove Insufficient.*

At common law a landlord had power to make a second distress if the first proved insufficient: Bullen Distr. 111; *Hutchins v. Chambers* (1758) 1 Burr. 589.

But a second distress cannot be justified where there is enough which might have been taken upon the first distress if the distrainor had then thought proper; for it was his folly that he did not take sufficient at first: Com. Dig. Distress (A. 1); *Bagge v. Mawby* (1853) 8 Exch. 641; see also *Gambrell v. Falmouth* (1835) 4 A.

& E. 73; *Lear v. Caldecott* (1843) 4 Q. B. 123; and a man who has an entire duty (as rent, for example) shall not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so *toties quoties* for several times; for that is great oppression: *Owens v. Wynne* (1855) 4 E. & B. 579; but see *McDonald v. Fraser* (*supra*).

By 17 Car. II., c. 7, s. 4, "in all cases where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears."

When a landlord has levied a distress he loses his right by voluntarily withdrawing or abandoning it. A., having distrained the goods of B. for rent said to be due him by B. and abandoned the same without realizing, subsequently made a second distress and sold the goods; it was held, in the absence of evidence of sufficient ground for the abandonment of the first distress, that the second was illegal: *Lyness v. Sifton* (1864) 13 U. C. C. P. 19; see also *Thwaites v. Wilding* (1883) 12 Q. B. D. 4; 53 L. J. Q. B. 1 [C. A.]; *Buist v. McCombe* (1883) 8 A R. 598; *La Vassaire v. Heron* (1882) 45 U. C. R. 7.

### *Abandonment.*

Whether a seizure has been abandoned is a question of fact: *Eldridge v. Stacey* (1863) 15 C. B. (N. S.) 458, cited by Stuart, J., in *National Trust Co. v. Leeson* (1916) 9 W. W. R. 1132 [Alta.—*supra*], where he held that a statement in a letter that the landlord agreed to the tenant vacating the premises on condition of leaving the seized furniture in the room as security for the payment of the rent due and that he would not enforce power of sale or distress with respect to the same without notice was nothing more than stating the facts of seizure and the affirmative of it in another form.

A landlord's bailiff distrained upon wheat grown upon a farm—and so notified the tenant—he then posted

on the granaries in which the wheat was stored notices that he had seized all the crop grown (on the lands) and anybody touching same will do so at their peril. He then went away and 15 days later the sheriff seized. The Court en Banc held there had been no abandonment: *Independent Lumber Co. v. David* (1911) 1 W. W. R. 134; 19 W. L. R. 387.

In *Theatre Amusement Co., Ltd. v. Squires & Reid* [1918] 3 W. W. R. 831 [Sask.—C. A.] an execution creditor of a purchaser under a hire purchase agreement of theatre equipment placed his execution in the hands of the sheriff, who—on the same day—went to the theatre and purported to make a seizure of the equipment covered by the lien note, which the defendant Reid to the sheriff's knowledge had already under seizure for rent. Reid's bailiff was in actual physical possession when the sheriff purported to seize. The defendant Reid did not abandon his seizure, but an arrangement was arrived at by which Reid handed over the keys of the building to the sheriff, who was to keep charge of the goods.

Haultain, C.J.S., said, p. 833: "It was contended on behalf of the plaintiff that the landlord, by handing over the keys to the sheriff, abandoned his distraint. I do not think that there was any abandonment. The sheriff was entitled to seize the goods in respect of the lienholder's interest in them, although he could not interfere with the landlord's distraint on the tenant's interest in them. The goods might reasonably be presumed to be in the joint custody of the landlord and the sheriff, each representing a different interest"; and see this case noted at p. 469, *post*.

After a distress for arrears of interest under the clause therefor in a mortgage, the bailiff remaining in possession and having the key of the premises, the fact of the mortgagor being allowed as a matter of grace to go in and out of the premises for the purpose of carrying on some work, does not constitute an abandonment of the distress: *Plaxton v. Barrie Loan Co.* (1899) 19 Occ. N. 315 [Ont., Meredith, C.J.].

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary: *Anderson v. Henry* (1908) 18 Occ. N. 379 [Ont.—Div. Ct.], distinguishing *Langtry v. Clark* (1896) 27 O. R. 280: and see p. 492, *post*.

There was held to be an abandonment in *Ritchie v. Snider* (1914) 28 W. L. R. 735; 17 D. L. R. 31 [Walsh, J.]. No impounding was made, and no one was left in possession—and a bailiff who, in July removed goods distrained in December and abandoned, was held guilty of trespass.

The landlord distrained a piano, then released possession taking a bond providing he might repossess if the rent were not paid in a few days. The rent was not paid and the bailiff removed the piano to storage. Held, as against a chattel mortgagee the distress had been abandoned. *Gosnell v. McTamney* (1910) 16 O. W. R. 176.

See *Mooers v. Manser*, noted at p. 416, *ante*.

### *The Exceptions.*

The abandonment to have the effect of preventing a second distress must have been a voluntary one and where the landlord withdraws at the request of the tenant and for his accommodation it is not a voluntary abandonment and he is not precluded from making a second distress for the same rent: *Harpelle v. Carroll* (1895) 27 O. R. 240 [Meredith, C.J.], following *Wollaston v. Stafford* (1854) 15 C. B. 278.

“Where the first distress is withdrawn, pursuant to an arrangement with the tenant, which the latter fails to observe, a second distress may be made”—per Meredith, C.J., in *Harpelle v. Carroll* (*supra*), following *Thwaites v. Wilding* (1883) 12 Q. B. D. 4.

Where the abandonment has been procured by the fraud of the tenant a second distress may be made: *Harpelle v. Carroll* (*supra*); *Wallaston v. Stafford* (*supra*).

But where there was a distress for the first quarter's rent before the expiration of the first month and the tenant's wife gave security for the first month's rent; it was held that a second distress for the same rent was illegal, for even if the first distress were legal and the rent payable monthly in advance, which was denied, the landlord was not justified in the second, as the tenant had committed no act to prevent the landlord from getting the benefit of the first distress: *Harris v. Wier* (1871) 8 N. S. R. 466.

Where the abandonment of the first distress is pursuant to an arrangement with the tenant which the latter fails to observe, the landlord may make a second distress for the same rent: *Thwaites v. Wilding* (1883) 12 Q. B. D. 4 [C. A.].

But the tenant must continue as such. A lease contained a clause of forfeiture in the event of an assignment in insolvency, and on such assignment the landlord distrained not only for rent theretofore due but for two quarters' rent which only became due in virtue of the insolvency. At the request of the official assignee the landlord abandoned the distress, and in lieu thereof agreed to look to the insolvent estate, the assignee repudiating any interest in the term. On failing to realize from the assignee, the landlord made a second distress; and it was held bad, for the first was not abandoned at the request of the tenant, the term being at an end and the assignee being the owner of the goods: *May v. Severs* (1874) 24 U. C. C. P. 396.

The general rule is that where a distress for a particular damage has once been abandoned, there cannot be a subsequent seizure for the same cause: *Buist v. McCombe* (1883) 8 A. R. 598. A mortgagee under a power of distress in his mortgage distrained on the goods of a tenant of the mortgagor under a lease subsequent to the mortgage, and addressed a letter to the tenant setting forth the claim for which the seizure was made and

further intimating that he had thereby entered and taken possession; but after so doing the mortgagee left the goods on the premises for nearly three months and then made another seizure; it was held that the latter was illegal, for in addition to the abandonment, the alleged tenancy at will under the mortgage was wholly determined by the former entry and notice: *La Vassaire v. Heron* (1882) 45 U. C. R. 7.

## CHAPTER IX.

### DISTRESS—*Continued.*

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## WHEN AND WHERE DISTRESS CANNOT BE MADE.

ARTICLE 67.—A distress for rent cannot be made [I] in the night (*i.e.* after sunset and before sunrise); [II] on a Sunday or other dies non; [III] on the day the rent becomes due; [IV] with certain



exceptions, elsewhere than on the land from which the rent issues; or [V] when the tenant has gone out of possession.

[Authorities:

I. *Independent Lumber Co. v. David* (1911) 19 W. L. R. 387; 1 W. W. R. 134 [Sask.—Ct. en B.] *Pegg v. I. O. F.* (1901) 1 O. L. R. 97; *Roe v. Roper* (1873) 23 U. C. C. P. 76; *Mah Po v. McCarthy* (1909) 2 Sask. L. R. 119; 10 W. L. R. 670 [Ct. en B.]; *Russell v. Buckley* (1885) 25 N. B. R. 264.

II. *Werth v. London, etc., Co.* (1889) 5 T. L. R. 320, 521.

III. *Dibble v. Bowater* (1853) 2 E. & B. 564.

IV. *Capel v. Buszard* (1829) 6 Bing. 150 and the Statutes noted at p. 431, *post*.

V. *Gray v. Stait* (1883) 11 Q. B. D. 668: Article 49.

### [I.] *In the Night.*

A distress for rent cannot be made in the night—that is, after sunset and before sunrise: *Russell v. Buckley* (1885) 25 N. B. R. 264; *Tutton v. Darke* (1860) 5 H. & N. 647; *Keen v. Priest* (1859) 4 H. & N. 240—because the tenant would not have any notice to make a tender of his rent which possibly he might do in order to prevent the distress: Co. Lit. 142a; *Aldenburgh v. People* (1834) 6 C. & P. 212.

It seems doubtful whether, for the purposes of a distress, sunrise commences with the first beams of the sun above the horizon, or when the middle of the sun is upon the horizon, or when the sun has completely emerged; “persons who distrain should bear in mind that a distress is to be made in the day time, and they ought not to go so near the limits as to raise any doubt on the subject”: *Tutton v. Darke* (*supra*).

An almanac is not evidence of the time of sunrise or sunset on a particular day, nor will the Court take judicial notice of such time: *Id.*; *Collier v. Nokes* (1849) 2 C. & K. 1013.

“To constitute a valid seizure by the landlord it must be made within the time in which the law allows him to make it, that is, between sunrise and sunset. . . It is, therefore, just as important in an interpleader issue between an execution creditor and a landlord—that the landlord furnish evidence that he seized within the time he could legally do so as evidence that he made a seizure at all. The onus is on the landlord: *Mah Po v. McCarthy* (1909) 2 S. L. R. 119; 10 W. L. R. 670,” per Lamont, J., in *Independent Lumber Co. v. David* (1911); 19 W. L. R. 387 [Sask. Ct. en Banc]; 1 W. W. R. 134, at p. 146; Brown J., hesitated—[see p. 147] as to the question of onus.

[II.] *A Sunday or Dies Non.*

Though a distress on Sunday or after sunset be illegal, the tenant may waive the irregularity, and if he does so the distress will be legal in respect of goods on the premises, and as against the mortgagees of such goods: *Werth v. London & Westminster Loan & D. Co.* (1889) 5 T. L. R. 320, 521. The action in this case was against the mortgagees by the landlord, who had distrained after 9 p.m. with the consent of the tenant: see also *Nattrass v. Phair* (1876) 37 U. C. R. 153-9.

[III.] *On the Day the Rent Becomes Due.*

See Article 46.

A distress cannot be made on the day the rent becomes due, for it is not in arrears until the next day: Co. Lit. 47 (b), note b; *Dibble v. Bowater* (1853) 2 E. & B. 564. But if by the terms of the lease the rent is payable in advance, the distress may be made immediately on the tenant's taking possession.

[IV.] *Elsewhere Than on the Land from which the Rent Issues.*

*Statutory Provisions.*

By the statute of Marlebridge (52 Hen. III., c. 15) “it shall be lawful for no man from henceforth for any

manner of cause to take distresses out of his fee, nor in the King's highway, nor in the common street, but only to the King and his officers having special authority to do the same."

As a general rule the distress, whether of the tenant's goods or those of a stranger, must be made on the land from which the rent issues and not elsewhere: Co. Lit. 161a; *Capel v. Buszard* (1829) 6 Bing. 150; *Martin v. Hutchinson* (1891) 21 O. R. 388. But the Crown may distrain on any tenant's lands wherever situate: 2 Inst. 132; and there is an exception in the case of fraudulent removals: *Fraser v. McFatridge* (1879) 13 N. S. R. 28; *Pidgeon v. Milligan* (1871) 13 N. B. R. 459, and see p. 432, *post*.

### *Similar Legislation.*

Ontario: R. S. O. 1914 c. 155, s. 46.

Saskatchewan: 1919, 9 Geo. V., c. 79, s. 28.

### *"Distress Elsewhere Than on the Land from which the Rent Issues."*

The goods of a *third person* cannot be distrained off the demised premises: *Martin v. Hutchinson* (1891) 21 O. R. 388; *Pidgeon v. Milligan* (1871) 13 N. B. R. 459.

Q. leased to H. an hotel by lease under seal, also and later six rooms in an adjoining building by parol lease. Q. distrained on the goods in the hotel for the rent due in respect of the hotel and of the six rooms:—Held, an illegal distress: *Hessey v. Quinn* (1910); 20 O. L. R. 442 [Osler, J.A.].

The goods of a tenant cannot be distrained elsewhere than on the land from which the rent issues except in the following cases:

*Exception 1.*—Where by agreement of the parties the distress may be made on other lands of the lessee.

A distress may by agreement be made on other lands of the lessee than those out of which the rent issues: *Daniel v. Stepney* (1874) L. R. 9 Ex. 185.

But without this the goods of the tenant himself cannot be distrained off the premises unless in case of fraudulent removal. On removal without fraud or by the act of the landlord himself the right to distress ceases. A lessor with a view of securing \$50 rent due to him by one Scott purchased a lot of furniture from the wife of Scott in his absence and removed it to his own premises. Previous to this Scott had given plaintiffs, from whom he had purchased the goods, a chattel mortgage on them as security for the price. Plaintiffs demanded the goods from the lessor, who refused to give them up except on payment of rent; and it was held that the latter had no lien on the goods for the rent, nor any right to distrain thereon after removal to his own house: *Fraser v. McFatridge* (1879) 13 N. S. R. 28.

*Exception 2.*—In the case of a fraudulent removal.

To prevent the clandestine removal of goods off the demised premises by tenants, to avoid a distress for rent, the 8 Anne, c. 14, s. 2, authorized landlords to follow and distrain them within five days after such removal.

And now by 11 Geo. II., c. 19, s. 1, “in case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due or made payable, it shall and may be lawful to or for every landlord, etc., or any person or persons by him, her or them for that purpose lawfully empowered within the space of *thirty days* next ensuing such conveying away, or carrying off such goods or chattels as aforesaid, to *take and seize such goods and chattels wherever the same shall be found*, as a distress for the said arrears of rent; and the same to sell or otherwise dispose of, in such manner as if the said goods

and chattels had actually been distrained by such landlord, etc., in and upon such premises for such arrears of rent.”

Section 2 provides “that no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bona fide* and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid.

Section 7 enacts “that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close or place, locked up, fastened or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her or their steward, bailiff, receiver, or other person or persons empowered, to take and seize as a distress for rent such goods and chattels (first calling to his, her or their assistance the constable, headborough, bors-holder or other peace-officer of the hundred, borough, parish, district or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein); and, in case of a dwelling-house (oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day-time, to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she or they might have done by virtue of this or any former Act, if such goods and chattels had been put in any open field or place.”

*This Statute is Re-enacted In:*

British Columbia: R. S. B. C. (1911) c. 65, ss. 11, 12, 15.

New Brunswick: C. S. N. B. (1903) c. 153, ss. 12, 13.  
Nova Scotia: R. S. N. S. (1900) c. 172, ss. 11, 12 [to be followed within 21 days].  
Ontario: R. S. O. 1914 c. 155, ss. 47 (1), 47 (2), 48.  
Saskatchewan: 1919, 9 Geo. V., c. 79, ss. 29 (1), 29 (2), 30.

*It is in Force in:*

Alberta and Manitoba.

The statute in New Brunswick differs from the 11 Geo. II., c. 19. Where the latter Act has the words "to prevent the landlord or lessor from distraining the same for arrears of rent so reserved," the former has only the words "to avoid a distress," and under it the Court has held that where goods are fraudulently or clandestinely removed without a distress, the landlord may follow them and distrain within thirty days thereafter, although the rent may not have been due or in arrear at the time of removal: *Hoyt v. Stockton* (1870) 13 N. B. R. 60.

But under this Act the mere removal of goods by the tenant from the demised premises where rent is in arrear is not conclusive evidence of a fraudulent intent to prevent the landlord from distraining, although the effect of such removal may be to prevent the landlord from thus recovering the rent, and in order to justify the landlord in pursuing them it must appear that they were removed with a view to elude the distress, and it is a question for the jury whether the removal is fraudulent within the statute: *Martin v. Gilbert* (1840) 3 N. B. R. 202.

Goods fraudulently or clandestinely removed to avoid distress cannot be seized under distress if there is no rent due: *Hoyt v. Stockton* (1870) 13 N. B. R. 60 considered; *Clark v. Green* (1907) 1 E. L. R. 552; 37 N. B. R. 525, and see *Whitelock v. Cook* (1900) 20 Occ. N. 171; 31 O. R. 463.

Where a lessee covenanted to keep on the demised premises sufficient chattels to answer a distress for four months rent an injunction to restrain him from removing his goods was refused on the ground that the Court

would not undertake to superintend the performance of a series of continuous acts: *Phipps v. Jackson* (1887) 56 L. J. Ch. 550, followed *Hill v. Fraser* (1914) 7 W. W. R. 131 [Alta.—Hyndman, J.].

*Penalty for Removing or Assisting to Remove.*

By 11 Geo. II., c. 19, s. 3, “to deter tenants from such fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein or concealing the same,” it is enacted, “that if any tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid to be recovered by action of debt.”

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 65, s. 13, and see s. 14, copied from s. 4 of the Imperial Act.

Ontario: R. S. O. 1914 c. 155, s. 49.

Saskatchewan: 1919, 9 Geo. V., c. 79, s. 31.

This section applies to the goods of the tenant only, and where the latter has given a valid bill of sale thereon the removal thereof by the bargainee, even for the purpose of avoiding a distress, will not bring the case within the statute: *Tomlinson v. Consolidated Credit & M. Co.* (1889) 24 Q. B. D. 135 [C. A.].

A third party who assists the tenant in the fraudulent removal can only be made liable when the case is brought by strict proof within the words of the first section: *Brooke v. Noakes* (1828) 8 B. & C. 537; and the defendant

must, in assisting the tenant, have known of his fraudulent intent: *Id.* But it is not necessary that the party upon whose lands the goods are found should be party or privy to the fraud: *Williams v. Roberts* (1852) 7 Exch. (1852).

When the person removing the goods has an interest therein it will rebut any inference of fraud. Thus where a chattel mortgagee removed the goods, the contention as to fraud was abandoned on argument: *Almon v. Law* (1894) 26 N. S. R. 340. A creditor may remove his debtor's goods though the latter be in distressed circumstances, in consequence of which the creditor fears a distress: *Bach v. Meats* (1816) 5 M. & S. 200.

Under the Act the removal must be either fraudulent or clandestine. When there is an open removal with notice to the landlord, but without leaving sufficient on the premises to satisfy the rent, it may be fraudulent: see *Opperman v. Smith* (1824) 4 D. & R. 33; *Bach v. Meats* (*ante*).

There is no authority for saying that goods fraudulently removed cannot be distrained if there are sufficient goods left on the premises to satisfy the arrears of rent, though leaving a large quantity of goods may rebut the inference of fraud: *Dale v. O'Brien* (1886) 26 N. B. R. 118, 123; see *Gillam v. Arkwright* (1850) 16 L. T. O. S. 88.

Rent payable quarterly or otherwise becomes due on the morning of the day on which it is reserved or made payable, although it is not in arrear for the purposes of distress until the following day [see p. 358]. If the tenant fraudulently removes his goods on the very day the rent becomes due, the landlord may on the next day (but not before), or within thirty days after such removal, follow and distrain upon them pursuant to the statute: *Dibble v. Bowater* (1852) 2 E. & B. 564; 22 L. J. Q. B. 396. The presence of a constable is required by the statute, and must be stated in a plea of justification where doors or gates are broken open: *Rich v. Woolley*, (1831) 7 Bing. 651; 5 M. & P. 663. The presence of a special constable appointed for the occasion is sufficient: *Cartwright v. Smith* (1833), 1 Moo. & R. 284.



*Ritchie v. Snider* (1914) 28 W. L. R. 735; 17 D. L. R. 31 [Walsh, J.—Alta.] was a case of fraudulent removal.

The 11 Geo. II., c. 19, only applies to the goods of tenants. A stranger or lodger will not be guilty of a fraudulent removal in taking his goods off the premises: *Pidgeon v. Milligan* (1871) 13 N. B. R. 459; *Thornton v. Adams* (1816) 5 M. & S. 38; *Postman v. Harrell* (1833) 6 C. & P. 225; *Fletcher v. Marillier* (1839) 9 A. & E. 457; *Foulger v. Taylor* (1860) 5 H. & N. 202; *McArthur v. Walkley* (1840), R. & J. Dig. 1087. The assignees of an insolvent lessee are, however, considered tenants: *Welch v. Myers* (1816) 4 Camp. 368. A tenant is not liable under the Act unless the goods removed are his own property: *Martin v. Huthchinson* (1891) 21 O. R. 388.

*Exception 3.*—Where the distress is chased off the demised premises—then the distress may be made even upon the highway.

If the landlord or his agent come to distrain cattle which he sees upon the land, and the tenant or any other person drives the cattle off the land, the landlord or his agent may then follow and distrain them, even on the highway: *Halsted v. McCormack* (1840), R. & Dig. 1087; but if he had no view of the cattle whilst on the land, although the tenant drive them off purposely to prevent a distress; or if the cattle themselves, after the view, go out of the fee, or the tenant or any other person, after the view, remove them for any other purpose than that of preventing a distress; in these cases the landlord or his agent cannot distrain them: Co. Lit. 161 (A.); 2 Inst. 132; *Clement v. Milner* (1800), 3 Esp. 95; Bullen, 125-6.

A landlord on the day of the removal of goods from the premises, rent being in arrear, forbade such removal until it was paid, and afterwards made a seizure on the highway some distance from the house; and it was held that a sufficient inception of the distress had taken place on the premises to warrant the seizure on the highway: *Pulver v. Yerex* (1859) 9 U. C. C. P. 270.

If the legality of a distress turn upon the place of seizure as whether it is a highway or not, that point

should be left clearly to the jury: *Halsted v. McCormack* (*supra*).

*Exception 4.*—The Crown may distrain on any of its tenants' lands wheresoever situate.

Com. Dig. Dist. (A. 3) and p. 431, *ante*.

*Exception 5.*—In the case of cattle feeding or depasturing upon any common appendant or appurtenant to the demised premises.

By the 11 Geo. II., c. 19, s. 8, every landlord may take and seize as a distress for arrears of rent any cattle or stock of his tenant feeding or depasturing [upon any common appendant or appurtenant, or in any ways] belonging to any part of the premises demised.

#### *Similar Legislation.*

British Columbia: R. S. B. C. (1911) c. 65, s. 16.

Nova Scotia: R. S. N. S. (1900) c. 172, s. 6.

Ontario: R. S. O. 1914 c. 155, s. 44 (1)—uses the words [upon any highway or on any way] for those in brackets.

Saskatchewan: 1919, 9 Geo. V., c. 79, s. 24 (1); copied from the Ontario Act.

#### [V.] *When the Tenant has Gone out of Possession.*

The statute as to Fraudulent Removal confers upon the landlord a power to distrain in those cases in which if the goods had not been removed he might have distrained either at common law or under the 8 Anne, c. 14, ss. 6, 7. Under the latter statute the distress must be during the possession of the tenant [see Article 49, p. 362, *ante*]; therefore in the case of a fraudulent removal there can be no distress if the tenant's interest in the demised premises has come to an end and he is no longer in possession: *Gray v. Stait* (1883) 11 Q. B. D. 668; 52 L. Q. B. 412 [C. A.], and see *Meighen v. Armstrong* [p. 380, *ante*]; *Taylorson v. Peters* (1837) 7 A. & E. 110 and Articles 64 and 65.

## LANDLORD OR BAILIFF.

ARTICLE 68.—Except in Alberta a distress may be made either by the landlord himself, or as is now the usual practice, by his duly authorized agent or bailiff.

In Alberta by 4 Geo. V., c. 4, s. 1, “Every distress . . . under the authority of any lease, attornment clause in any real estate mortgage or agreement for sale relating to either insurance premium, interest, principal or instalment of principal, any agreement of sale . . . shall be made . . . by a sheriff, bailiff or other person authorized by a sheriff, an assistant sheriff or a deputy sheriff, in writing and by no other person whatsoever . . .” Section 2 provides a penalty for breach of this section.

*Liability of Bailiff.*

By section 3 of the Alberta Act any of the above duly authorized persons shall only act upon receipt of a proper warrant and may, “before acting . . . require the party issuing the same to indemnify him as to costs and damages in such amount as would be reasonable under the circumstances.”

An action for illegal distress should be brought against the bailiff who committed the act complained of and not against the landlord unless the landlord (1) authorized the wrongful act; (2) ratified it when it came to his knowledge; (3) chose to take responsibility without inquiry. *Zarr v. Confederation Life Ass'n* (1915) 8 W. R. 365 [Sask.—Ct. en B.].

“There is a great difference as regards the liability of a principal between the agent doing an authorized act in an illegal manner and the agent doing an act which was not authorized at all. In the first case the principal is liable; in the second case he is not: per Haultain, C.J., (p. 367), in *Zarr v. Confederation Life Ass'n* (*supra*); *Choderker v. Harrison* (1911) 20 M. R. 727; 15

W. L. R. 687 [C. A.—Robson, J.], following *Hope v. White* (1866) 17 U. C. C. P. 52.

Although the bailiff has legal authority to distrain, yet if his conduct show that he did not in fact act on that authority, he cannot rely on it: *Lucas v. Nockells* (1828) 4 Bing. 740; 10 Bing. 182, 190; and, where he justifies under a warrant of distress, the tenant cannot enter into his motives or show that he had no intention of acting under it, there being nothing done inconsistent with the intention to pursue the authority: *Scott v. Vance* (1851) 9 U. C. R. 613.

As to the position of a sheriff distraining as a bailiff see *Bancroft v. Richards* (1913) 3 W. R. R. 825 [B. C.—C. A.] at p. 485, *post*.

Generally speaking, a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions which are maintainable on the ground that the landlord had no right to distrain: *Toplis v. Grane* (1839) 5 Bing. N. C. 636. The distress warrant often contains the words that the warrant itself shall be the bailiff's sufficient warrant and indemnity, as in *Ibbett v. De La Salle* (1860) 6 H. & N. 233; 30 L. J. (Ex.) 44. The bailiff will be equally protected though the instructions come from the landlord's agent, provided it is not shown that he knew he was acting illegally. The fact that the bailiff holds a bond of indemnity from the principal will not alter the implied liabilities of the agent to him; and irrespective of any bond of indemnity where the bailiff duly authorized wrongfully seizes the property of a third person on the premises, the landlord will be liable to him: *Wallace v. Gulchrist* (1874) 24 U. C. C. P. 40.

Where a bailiff held a bond indemnifying him against all damages, costs, charges, expenses and disbursements which he might be put to or incur through any illegal act committed by him on the authority of the landlord, it was held that he was entitled to recover the costs of an action brought against him for wrongful distress: *Id.*

Where the warrant of distress contained the following clause, "And for your so doing this shall be your suffi-

cient warrant and authority and indemnification against all costs and charges in respect of any law expenses, action or actions, that may arise, as well as any other and all other charges or expenses which you or your agent may be at, or be brought against you or your agent on this account," it was held that the indemnity extended to the costs of defending an action of trover wrongfully brought by the tenant (who admitted the tenancy and the rent being due) against the landlord's agent for goods taken under the distress, in which action the tenant was nonsuited: *Ibbett v. De La Salle* (*supra*).

A landlord gave authority to a bailiff to distrain the goods of his tenant, and an indemnity against all costs and charges that he might be at "on that account," and upon making the distress, the bailiff's men, being told by the son of the tenant that a cask contained spent liquor of no value, took the cask to pieces and let the liquor run off, when in fact it was cochineal dye belonging to a third person, who, for wasting it, recovered damages in trover against the bailiff, it was held that he could not recover the amount of those damages from the landlord in an action on the indemnity; and that such an indemnity could only apply to such cases where the distress was illegal, because the landlord had no right to distrain: *Draper v. Thompson* (1829) 4 C. & P. 84.

### *The Liability of the Landlord.*

The general rule is that a landlord is not liable for any illegal acts committed by his bailiff or agent in executing a warrant, if such acts are not authorized thereby, unless it can be proved that the landlord authorize such acts, or subsequently adopted or ratified them, with knowledge of what had been done on his behalf, or that he chose without enquiry to take the risk upon himself and to adopt such illegal acts: *Freeman v. Rosher* (1849) 13 Q. B. 780; 18 L. J. Q. B. 340; *Lewis v. Reed* (1845) 13 M. & W. 834; *Haseler v. Lemoyne* (1858) 5 C. B. N. S. 530; 28 L. J. (C. P.) 103; *Zarr v. Confederation Life Ass'n*, *ante*, p. 439, and *Dick v. Winkler* (1899) 12 M. R. 624; 19 C. L. T. 330.

If the bailiff acts without authority the landlord will not be liable unless he adopt the act. Thus, if the warrant be to seize the goods of the tenant and the bailiff take those of a stranger: *Edmonds v. Hamilton Provident Loan and Savings Co.* (1891) 18 A. R. 347.

When the reversion is severed, and the bailiff of one lessor first makes a distress upon the part of the demised premises of which the reversion is in the other lessor, this does not bind the former in the absence of ratification by him or express prior authority, and therefore does not exhaust his right of distress: *Mitchell v. McCauley* (1893) 11 C. L. T. 325, 20 A. R. 272; *Ferrier v. Cole, infra*; *Lewis v. Read (infra)*.

Where the lessor authorized a bailiff to distrain for rent on his tenant's premises, but the bailiff seized off the premises without the lessor's knowledge, and there was no evidence of his having adopted the act, he was relieved from liability: *Ferrier v. Cole* (1857) 15 U. C. R. 561.

If, for instance, a bailiff sell a distress without due notice or without proper appraisement or the like, the landlord is liable; so if he distrain for an excessive amount or do not sell for the best price, or make extortionate charges, or do not hand the overplus to the tenant, or the like: *Id.*; *Ward v. Shew* (1833) 9 Bing. 608; *Robinson v. Shields* (1866) 15 U. C. C. P. 386.

Trespass will lie against a landlord for the act of his bailiff in distraining sheep, when there are sufficient other goods, provided it appears that he has spoken of his making the sale and has received the proceeds thereof, and there is no evidence to show his non-compliance therein: *Hope v. White* (1872) 22 U. C. C. P. 5.

And the landlord is liable if the bailiff break into the premises: *Anglehart v. Rathier* (1887) 27 U. C. C. P. 97;

So a landlord is responsible for his bailiff's act in refusing a tender, though the landlord has not authorized anything unlawful: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476.

And if A. distrain cattle damage feasant and authorize B., a pound-keeper, to sell, both A. and B. will be

liable if the proceedings are illegal: *Buist v. McCombe* (1883) 8 A. R. 598.

The form of Warrant is prescribed by C. S. N. B. (1903), c. 153, s. 9.

Where the goods were in fact seized off the premises, but the bailiff, after finding them, went to the lessor and told him where they were and asked him to send some one to identify them, and he then sent his clerk, who was informed that the goods belonged to the tenant, but was forbidden to seize, and the lessor subsequently received the proceeds of the sale, and at the trial admitted that he had authorized the seizure off the premises, it was held there could be no question that he had given authority to the bailiff, and was liable for his act: *Montgomery v. Hellyar* (1894) 9 M. R. 551.

A person employed by a sheriff in making a distress where the landlord has been compelled to use the sheriff or sheriff's officer has no claim against the landlord if the sheriff does not pay him. *Weaver v. McGregor and The Calgary Furniture Store, Ltd.*, [1917], 2 W. W. R. 795 [Alta.].

## OBTAINING ENTRY.

ARTICLE 69.—The entry to make a distress must be through the ordinary and natural means of ingress to the place where the distress is about to be made: the bailiff cannot go into any building or any house if he can only do so by breaking into it.

[Authorities: *Anglehart v. Rathier* (1877) 27 U. C. C. P. 97; *Long v. Clarke* [1894] 1 Q. B. 119 (C. A)].

### “The Outer Door.”

The outer door of a tenant's house cannot lawfully be broken open in order to make a distress: *Lemoyne's Case* (1611) 5 Co. R. 91.

“Outer door” was considered by Bowen, L.J., in *American Concentrated Must Co. v. Hendry* (1893) 62 L. J. Q. B. 388, and it was there held that the gate of the court yard into which the plaintiff's warehouse, together with other buildings, opened, must not be considered as

the outer door with respect to the plaintiff's warehouse, the door of which was held to be its own "outer one."

This case was considered and applied by Martin, J.A., giving the reasons for judgment of the British Columbia Court of Appeal in *Welch v. Kracovsky* [1919] 3 W. W. R. 361, where it was held that a door connecting a suite of rooms exclusively occupied by a tenant in an apartment house with a hall used in common by the tenants of different suites in the building and leading to the main entrance to the building was the "outer door" which might not be broken open.

Martin, J.A., also approved *Swan v. Mizner* (1857) 74 Mass. R., 182, and held *Lee v. Gansel* (1774) Loft 374; Cowp. 1, inapplicable.

In *Miller v. Curry* (1893) 25 N. S. R. 537, the bailiff took down a key from a nail and unlocked the "outer" door of a tenant's apartment; it was held to be a breaking and the distress was declared void.

Where a sub-tenant has an apartment with an outer door it is illegal to break into that apartment to make a distress: *McArthur v. Walkley* (1840) R. & J. Dig. 1084.

### *Breaking In.*

Entering with a pass key was considered to be breaking in: *Welch v. Kracovsky* [1919] 3 W. W. R. 361 [B. C. —C. A.] *supra*.

D. was tenant of one part of a building; B. of the other. The bailiff obtained access to D.'s premises through a door in a partition separating D.'s part from B.'s. The door was at one time used as a means of communication, but B. had placed a latch on his side of the door and an obstruction against it. B. removed the obstruction and allowed the bailiff to enter:—Held, that entrance to D.'s premises was made without a breaking and the distress was legal: *Gould v. Bradstock* (1812), 4 Taun. 562, applied. Judgment of the Supreme Court of Nova Scotia (1919) 52 N. S. R. 201; 40 D. L. R. 314, reversed; *McKay v. Douglas* (1919) 57 S. C. R. 453; 44 D. L. R. 570 [S. Ct. Can.].



Where a bailiff went through the next house and into a yard at the back, and then climbed over a wall into the yard of the house in which he was directed to distrain and enter and distrained without breaking anything, the distress was held lawful: *Long v. Clarke* [1894] 1 Q. B. 119 [C. A.].

The entry must be through the ordinary and natural means of ingress to the place where the distress is about to be made. In one case the tenant's and the adjoining house were under the same roof, as were also the kitchens in the rear, over which there was a dark loft, which was undivided and access to which was through a hole or trap door in the ceiling of each kitchen. The bailiff entered the adjoining house, got through the trap door in that house into the loft, and then removing the trap door in the tenant's house descended into the kitchen and distrained, and the distress was held illegal: *Anglehart v. Rathier* (1877) 27 U. C. C. P. 97.

The distrainor may open an outer door by turning the key, lifting the latch or drawing back the bolt: *Ryan v. Shilcock* (1851) 7 Exch. 72; 21 L. J. (Ex.) 55.

But he cannot put his hand through a hole in the door, or through a broken pane of glass and thus remove a fastening, or break open a window, or unfasten a hasp; these not being the usual or accustomed modes of obtaining admission to the premises: *Hancock v. Austin* (1863) 14 C. B. N. S. 634; 32 L. J. C. P. 252; *Attack v. Bramwell* (1863) 3 B. & S. 520; 32 L. J. Q. B. 146.

In making a distress the officer may open a door which is only fastened by a latch, but he cannot open a window which is closed but not fastened, and it makes no difference that the opening is by another person if it is at the instance of the officer executing the warrant: *Nash v. Lucas* (1867) L. R. 2 Q. B. 590.

If a window is closed and the bailiff open it and so enter, the entry is a breaking and illegal, but the entry may be lawfully made by further opening a window which is partly open: *Crabtree v. Robinson* (1885) 15 Q. B. D. 312; 54 L. J. Q. B. 544.

“To hold that it is a breaking for a landlord making a distress to enter a door opened by the tenants’ servant, without privity of intent—for of course with privity the act of the agent would be the act of the principal—to my mind could only be done by confusing a trespass with a breaking. The act of entry is a trespass, but a lawful one by a landlord making a distress without a breaking; and once in without such breaking the landlord could enter and re-enter at his pleasure with or without a breaking: *Sandon v. Jervis* (1858) 28 L. J. Ex. 156, and *Mahomed v. The Queen* (1843) 4 Moore P. C. 239”: *Haszard v. Sterns* (1911) 9 E. L. R. 321 [P. E. I.—Fitzgerald, V.C.].

### *Windows.*

An entry through an open window is lawful: *Nixon v. Freeman* (1860) 5 H. & N. 652.

It is clear that if a tenant in arrear with his rent, leave his window open, and the bailiff enter, either by opening it further or by getting in through the window as it is, the distress is not illegal, and a skylight on the roof of a house to which the bailiff obtains access from the roofs of adjoining houses may be further opened in order to effect a distress: *Miller v. Tebb* (1893) 9 T. L. R. 515 [C. A.].

### *The Distress is Void if There is a Breaking.*

If the outer door or a window, etc., be unlawfully broken open the distress is wholly illegal and void: *Attack v. Bramwell* [*ante*, p. 445].

In New Brunswick it has been held that breaking open a tenant’s building or house in order to distrain for rent renders the distress illegal and not merely irregular. Where a distress is illegal in its inception trespass lies, and s. 7 of the Con. Stat. N. B. c. 83, [as to which see p. 510], which provides that any irregularity in conducting the distress where rent is due shall not make the distrainor a trespasser, is not applicable where the distress is illegal *ab initio*: *Russell v. Buckley* (1885) 25 N.

B. R. 264; overruling *Myers v. Smith* (1859) 9 N. B. R. 207.

In *Nattrass v. Phair* (1876) 37 U. C. R. 153, the question was raised whether a mortgagee of the tenant's goods could sue for a breaking into the premises in order to distrain, where the tenant himself made no complaint in respect of the trespass. Wilson, J., was of opinion that if the tenant gave a license to break the outer door to distrain it would be a justification. So if a person riding a horse of the tenant, or a person to whose house goods have been removed, gave a license to distrain, the distress would be legal.

A distress which is void and illegal *ab initio* because of a breaking in is no bar to a subsequent valid distress: *Grunnell v. Welch* [1906] 2 K. B. 555; 22 T. L. R. 688; 26 C. L. T. 638 [C. A.], affirming [1905] 2 K. B. 650, 21 T. L. R. 554; 25 C. L. T. 448

### *Breaking After Lawful Entry.*

If the outer door of a house be open the person distraining may justify breaking open an inner door or lock to find any goods which are distrainable: *Browning v. Dann* (1736) Bull. N. P. 81; Co. Lit. 161a.

If the bailiff having lawfully entered be ejected by force, he may return with help, demand admittance, and then break in if necessary, for this would be a continuance of the first taking: Esp. N. P. 382.

So where a man put in possession under a distress leaves the house for a short time for a purpose not necessary but reasonably convenient, there is no abandonment [as to which see p. 421] of the distress, and he may break the outer door for the purpose of re-entering: *Bannister v. Hyde* (1860) 2 E. & E. 627.

Where the bailiff re-enters to distrain after being ejected from the premises, he should confine himself to the same goods, for he is only continuing the original taking: *Smith v. Taylor* (1862) 3 F. & F. 505.

After a lawful entry to distrain the bailiff may if necessary break open the outer door to get out and remove the distress: *Pugh v. Griffith* (1838) 7 A. & E. 827.

## CONSTRUCTIVE DISTRESS.

ARTICLE 70.—An actual seizure of goods is not necessary to constitute a distress; any word or act expressive of a present intention to assume control of the goods is sufficient.

[Authorities: *National Trust Co. v. Leeson & Lineham* (1916) 9 W. W. R. 1134; 33 W. L. R. 587; 9 Alta. L. R. 245; *Peterson v. Johnston* (1911) 17 W. L. R. 596 [Alta.—App. Div.]; *De Grouchy v. Sievret* (1890) [30 N. B. R. 104].

*Examples of "Constructive" Seizure.*

A landlord *touches* an article saying: "I will not suffer this or any of the things to go off the premises till my rent is paid": *Wood v. Nunn* (1816) 5 Bing. 10; 6 L. J. (O. S.) C. P. 198.

A landlord's agent merely stood in the doorway and said: "the piano shall not be taken away till our rent is paid": *Cramer Co. v. Mott* (1870) L. R. 5 Q. B. 357; 39 L. J. Q. B. 172, in which Cockburn, C.J., said "It is enough that the landlord or his agent takes effectual means to prevent the removal of the article off the premises on the ground of rent being in arrears and he does that when he declares that the article shall not be removed till the rent is paid."

The landlord stated that "the furniture would have to remain where it was until the rent was paid": *National Trust Co. v. Leeson & Lineham* (1916) 9 W. W. R. 1134 (*supra*).

"I want my stuff—you pay the rent": *Mah Po. v. McCarthy* (1909) 2 Sask. L. R. 119 [Ct. en B.], and see *Independent Lumber Co. v. David* (1911) 1 W. W. R. 134, 19 W. L. R. 387 5 Sask. L. R. 1.

Forbidding the removal of wood—the property of the tenant from the premises: *Smith v. Haight* (1900) 4 Terr. L. R. 387 [Wetmore, J.].

Where a landlord's agent went upon the tenant's premises, walked round them without touching anything, and gave the usual notice of distress as to certain of the goods (of much more than sufficient value), and then went away without leaving anyone in possession, it was held that this was a sufficient seizure to enable the tenant to sue the landlord for an excessive distress: *Swann v. Falmouth* (1828) 8 B. & C. 456; 2 M. & R. 534.

Any act or word expressive of a present intention to assume control of the goods is sufficient: *De Grouchy v. Sievert*, *Cramer v. Mott* (*ante*); *Black v. Coleman*, *infra*. This may be done by taking hold of some piece of furniture or other article and saying, "I distrain this in the name of all the goods on the premises," or words to that effect: see *Dod v. Monger* (1705) 6 Mod. 215; *Draper v. Thompson* (1829) 4 C. & P. 84.

Where a landlord to whom rent was in arrear, on hearing his tenant and a stranger disputing about removing a lathe, entered the house, and laying his hands on the machine, said, "I will not suffer this, or any of the things to go off the premises till my rent is paid," the distress was held to be sufficiently made: *Wood v. Nunn* (1828) 5 Bing. 10; 2 M. & P. 27; followed in *Cramer v. Mott* (*ante*, p. 448).

Where a bailiff went to the tenant's house and pressed for payment of rent and expenses, but touched nothing, and made no inventory, and the tenant then paid the rent and expenses under protest, this was held to constitute a distress: *Hutchins v. Scott* (1837) 2 M. & W. 809.

There is no necessity for a corporal touch where the goods are in sight and where the tenant points them out as his, asserting that they are liable to be seized and requesting that they may be considered to be seized as a distress for rent. In such case the seizure will be complete though no one be left in possession and no security be taken for the production of the goods; the bailiff relying on the tenant's assurance and knowing that the intention is to replevy: *Finn v. Morrison* (1855) 13 U. C. R. 568; following *Hutchins v. Scott* (*ante*).

A bailiff under a distress warrant entered and made an inventory "of the several goods and chattels distrained by me, viz.: In front shop, quantity of millinery," etc., "together with sundry articles on the premises." The tenant then gave to the bailiff the following receipt, "I acknowledge to have received from G., bailiff, all the goods and chattels in house No. 113," etc. "seized for rent," etc., "to be delivered to him, the said bailiff, when demanded." It was held that this and much less would constitute a distress executed: *Black v. Coleman* (1879) 29 U. C. C. P. 507.

### GOODS OF TENANT.

ARTICLE 71.—With certain exceptions all cattle, goods and chattels of the tenant which are found upon the demised premises may be distrained for rent.

[Authorities: *Theatre Amusement Co. v. Reid* [1919] 2 W. W. R. 63; 12 Sask. L. R. 174 [C. A.] 1920, 1 W. W. R. 870; 60 S. C. R. 92, and see Article 72].

#### "Of the Tenant."

The right to distrain goods of strangers is dealt with in Article 72, following.

#### "On the Demised Premises."

As to when a distress may be made off the demised premises see Article 67 and notes p. 428, *ante*.

#### *The General Exceptions to the Rule.*

*Exception 1.*—The property must not be in such a situation that the attempt to distrain it would probably lead to a breach of the peace.

The actual user of goods of whatever kind exempts them from seizure either by distress or otherwise, and whether in the case of distress there be a sufficiency or

not of other goods on the premises liable therefor. . Without actual user beasts of the plough and implements of husbandry are privileged only when there are sufficient other goods on the premises: *Miller v. Miller* (1867) 17 U. C. C. P. 226; *Higson v. Thompson* (1850) 8 U. C. R. 561.

A horse cannot be distrained whilst a person is actually riding it, nor an axe in a man's hand cutting wood: Co. Lit. 47a; *Storey v. Robinson* (1795) 6 T. R. 138; *Field v. Adames* (1840) 12 A. & E. 649.

A pair of horses belonging to a stranger, which are driven on to the premises of the tenant and tied there while the party in whose charge they are goes into the house for a few minutes, are not seizable for rent due by the tenant if they are in actual use at the time of the distress, and the seizure during such use would involve the risk of a breach of the peace: *Couch v. Crawford* (1860) 10 U. C. C. P. 491.

Upon the same principle wearing apparel, if in actual use, cannot be distrained; but if it be not in use, though taken off only for natural repose, it may be distrained: *Bissett v. Caldwell* (1790) Peake, 50; *Baynes v. Smith* (1794) 1 Esp. 206.

*Exception 2.*—The tools and implements of a man's trade are privileged from distress for rent (1) if they be in actual use at the time although there is no other sufficient distress on the premises; (2) if there be other sufficient distress on the premises then even though the tools be not in use.

The tools and implements of a man's trade are privileged from distress for rent if they be in actual use at the time, although there is no other sufficient distress on the premises: *Simpson v. Hartopp* (1744) Willes, 512, 1 Sm. L. C. (12 Edn.) 49. When there are other sufficient goods on the premises it is illegal to distrain on the tools and implements of a man's trade although they are not in actual use at the time: *Reilley v. McMinn* (1874) 15 N. B. R. 370; *Nargett v. Nias* (1859) 1 E. & E. 439.

The tools and implements of a man's trade which are not in use at the time may be distrained for rent if there be no other sufficient distress on the premises: *Gorton v. Falkner* (1792) 4 T. R. 565; *Simpson v. Hartopp* (*ante*).

As tools and implements of a man's trade are exempted from seizure under execution in Ontario, exception 3 (*post*) applies in Ontario.

And see *Boyd v. Bitham* (1908) W. N. 206; 28 C. L. T. 1041 [1909] 1 K. B. 14.

*Exception 3.*—(Applicable in Ontario only). The goods and chattels exempt from seizure under execution shall not be liable to distress by a landlord for rent if such exemption is claimed and the goods sought to be retained indicated by the tenant.

“The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent except as hereinafter provided”: R. S. O. 1914 c. 155, s. 30 (1). In the case of a monthly tenancy the exemption shall only apply to two months' arrears of rent: R. S. O. 1914 c. 155, s. 30 (2).

The person claiming such exemption shall select and point out the goods and chattels as to which he claims exemption: R. S. O. 1914 c. 155, s. 30 (3).

As to the property exempt from seizure under execution in Ontario, see the R. S. O. 1914 c. 80, s. 3.

By R. S. O. 1914 c. 155, s. 33 (1) “a tenant in default for non-payment of rent shall not be entitled to the benefit of the exemption provided for by s. 30 unless he gives up possession of the premises forthwith or is ready and offers to do so.”

By s. 33 (2) the “offer may be made to the landlord or to his agent; and the person authorized to seize and sell the goods and chattels, or having the custody of them for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of possession.”

By s. 34 (1) a landlord who desires to seize exempted goods, shall, after default has been made in the payment



of rent and before or at the time of seizure, serve the tenant with a notice Form I.

## FORM 1.

(Section 34).

### NOTICE TO TENANT.

Take notice that I claim \$        for rent due to me in respect of the premises which you hold as my tenant, namely, (*here briefly describe them*); and unless the said rent is paid, I demand from you immediate possession of the said premises; and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me possession of the said premises within three days after the service of this notice, I am by *The Landlord and Tenant Act* entitled to seize and sell, and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

Dated this                      day of                      , 19        .  
To C.D. (*tenant*).                      A. B. (*landlord*).

The service of the notice *shall* be made either personally or by leaving the same with a grown-up person in and apparently residing on the premises occupied by the person to be served: s. 36 (1).

If the tenant cannot be found and his place of abode is not known, or admission thereto cannot be obtained, the posting up of the notice on some conspicuous part of the premises shall be good service: s. 36 (2).

No proceedings under these sections shall be rendered invalid by any defect in form: s. 37.

The surrender of possession in pursuance of the notice shall be a determination of the tenancy: s. 34 (2).

When the Ontario Act was copied in Saskatchewan in 1919 these provisions [s. 30] were omitted.

*The limitation of two months' rent in the case of a monthly tenancy.*

The words were held to be meaningless in *Harris v. Canada Permanent Loan and Savings Co.* (1897) 17 Occ. N. 424; 34 C. L. J. 89 [Ont.—McDougall, Co.J.] and see *Shannon v. O'Brien* (1897) 34 C. L. J. 421.

*McGaw v. Trebilcock* (1900) 37 C. L. J. 703, held they meant that the tenant was entitled to an amount equal to two months' rent which ought to be paid to him before or after sale.

*Exception 4.*—Goods in the custody of the law, such as property already taken, damage feasant or in execution, cannot be distrained for rent.

This subject is dealt with—as to executions in Article 83, p. 514, *post*.

Goods assigned for the benefit of creditors are not *in custodia legis*: see p. 398, *ante*.

*Exception 5.*—Goods which might perish before they could be replevied could not at common law be seized.

A distress, being anciently considered merely as a pledge in the hands of the lord to compel the tenant to perform the service or duty required, could not at common law be sold, but was to be restored in the same plight to the owner, when such service or duty was performed; and therefore nothing could be distrained unless it could be returned in specie and undamaged, and in the same state as when taken: *Co. Lit.* 47*b*; *Pitt v. Shew* (1821) 4 B. & Ald. 208; *Darby v. Harris* (1841) 1 Q. B. 895; 1 G. & D. 234; *Dalton v. Whitem* (1842) 3 Q. B. 961; *Thompson v. Pettitt* (1847) 10 Q. B. 101; *Moore v. Drinkwater* (1858) 1 F. & F. 134.

Now the statutory provisions set out at p. 497, *post*, apply.

*Exception 6.*—Money is not distrainable unless it has been placed in a sealed bag: 3 Steph. Com. (11th Ed.) 265.

*Exception 7.*—Wild animals (*feræ naturæ*) are, at common law, exempt from distress.

*Exception 8.*—Beasts that gain the land: and see p. 457, *post*.

*Exception 9.*—Buildings or fixtures which a tenant has no right to remove from the freehold are not distrainable, although there are no other goods on the premises, but those slightly attached thereto, and which may be removed by a tenant at his pleasure during the term without destroying their character or injuring them, may be distrained.

So furnaces, millstones, chimney-pieces and the like cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow: *Simpson v. Hartopp* (1744), Willes, 512; and because those things only can be distrained for rent which the landlord can afterwards restore in the plight in which they were before the distress, and without injury thereto by the removal: Co. Lit. 47*b*; *Pitt v. Shew* (1821), 4 B. & Ald. 207; *Darby v. Harris* (1841), 1 Q. B. 895; 1 G. & D. 234; *Dalton v. Whitem* (1842), 3 Q. B. 961; *Thompson v. Petitt* (1847), 10 Q. B. 101; *Moore v. Drinkwater* (1858), 1 F. & F. 134.

If a landlord, under a distress for rent, severs fixtures from the freehold and disposes of them, he is liable in trover: *Dalton v. Whitem* (1842) 3 Q. B. 961.

In such action their value as chattels only (not as fixtures) can be recovered: *Clarke v. Holford* (1848) 2 C. & K. 540; *Thompson v. Petitt* (1847) 10 Q. B. 101; *Moore v. Drinkwater* (1858) 1 F. & F. 134.

No action can be maintained for a mere constructive seizure of fixtures as a distress, but without any actual seizure or severance, or removal thereof: *Beck v. Denbigh* (1860) 29 L. J. C. P. 273.

Machinery and a steam engine attached to the freehold, and the property of the tenant under a special agreement, may, when severed from the freehold, be distrained: *Davey v. Lewis* (1860) 18 U. C. R. 21.

But the hardwood flooring of a roller skating rink, put down by the tenant expressly for skating and capable

of removal, is a tenant fixture and exempt from distress: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 746.

Fixtures are dealt with in Articles 127, 128 and 129, at pp. 823, *et seq.*, *post*.

### *The Right to Distrain Grain, etc.*

By the common law cocks and sheaves of corn and other farm produce and growing crops could not be distrained, but were absolutely privileged from distress for rent, although there were no other goods on the premises: *Simpson v. Hartopp* (1744) Willes, 512; 1 Smith's L. C. (12th Edn.) 493.

But by the 2 W. & M. Sess. 1, c. 5, s. 3, any person having rent in arrear and due upon any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary or upon any hovel, stack or rick, or otherwise, upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found for or in the nature of a distress until the same shall be replevied or sold [but the same must not be removed from such place to the damage of the owner].

### *Similar Legislation.*

This statute is re-enacted in

British Columbia: R. S. B. C. 1911 c. 65, s. 8.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 4.

Ontario: R. S. O. 1914 c. 155, s. 43, with changes in the wording—"grain for corn," and giving a power of sale in so many words.

Saskatchewan: 1919, 9 Geo. V. c. 79, s. 23, omitted the provision in brackets.

### *The Right to Distrain Growing Crops.*

By the (1737) 11 Geo. II., c. 19, ss. 8, 9 [Imp.] the landlord may take and seize as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruit, pulse, or

other product whatsoever growing upon any part of the estate demised as a distress for arrears of rent, and the same may cut, gather, make, cure, carry and lay up when ripe in the barns or other proper place on the premises; and if there should be no barn or other proper place on the premises, then in any other barn or proper place which he shall hire or otherwise procure for that purpose and as near as may be to the premises, and in convenient time appraise, sell, or otherwise dispose of the same towards satisfaction of the rent, and of the charges of such distress, appraisement and sale; [the appraisement thereof to be taken when cut, gathered, cured, and made and not before]; provided that notice of the place where such distress shall be lodged shall within the space of one week after the lodging or depositing thereof in such place be given to the tenant or left at his last place of abode; [s. 8] and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn be cut the distress shall cease and the corn be delivered up [s. 9].

### *Similar Legislation.*

The statute is re-enacted in

British Columbia: R. S. B. C. 1911 c. 65, ss. 16, 17.

New Brunswick: see C. S. N. B. 1903, c. 153, ss. 17 (1), 17 (2) noted at p. 500, *post*.

Nova Scotia: R. S. N. S. 1900 c. 172, ss. 5 (1), 5 (2), 5 (4), and as to appraisement see p. 509, *post*.

Ontario: R. S. O. 1914 c. 155, ss. 44 (2), 44 (3) and 44 (4), which uses the word "standing" instead of growing, and adds the provisions as to sale set out at p. 500, *post*. It omits the words in brackets.

Saskatchewan: 1919, 9 Geo. V. c. 79, s. 24 (2), 24 (3) and 24 (4), is copied from the Ontario Act.

### *The Right to Distrain Cattle.*

By 51 Hen. III., Stat. 4 [Imp.], no man "shall be distrained by his beasts that gain his land, nor by his sheep,

while there is another sufficient distress to be found (except for damage feasant).”

The statute is re-enacted in Ontario as s. 45 of the Landlord and Tenant Act (R. S. O. 1914 c. 155) in the following words:

“Beasts that gain the land and sheep shall not be distrained for a debt due to the Crown, nor for a debt due to any man, nor for any other cause, if there are other chattels sufficient to satisfy the debt or demand,” with an exception as to animals damage feasant.

This section was not copied in Saskatchewan in 1919. It should also be observed that certain animals are exempt from execution and therefore distress by the Act referred to at p. 452.

This is in affirmation of the common law: 2 Inst. 132. Cart colts and young steers, not broken in or used for harness or the plough, are not privileged from distress as beasts which gain the land: *Keen v. Priest* (1859), 2 H. & N. 236.

But under this Act it is illegal to distrain sheep for rent when there are other goods on the premises sufficient to satisfy the claim: *Hope v. White* (1872) 22 U. C. C. P. 5.

If there be not sufficient distress actual user is the only other ground of privilege: *Muller v. Muller* (1867) 17 U. C. C. P. 226; *Higson v. Thompson* (1850) 2 U. C. R. 561.

The sheep of an under-tenant are privileged if there are other goods on the premises, whether belonging to the under-tenant or any other person: *Keen v. Priest* (1859) 2 H. & N. 236.

But there is no exemption in case of damage feasant either in relation to sheep, beasts of the plough, or any other animal.

## GOODS OF STRANGERS.

ARTICLE 72.—The general rule in Alberta, Manitoba, Ontario and Saskatchewan is that [a landlord shall not distrain for rent on the goods and chattels

of any person except the tenant or person who is liable for the rent, although the same are found on the premises] but there are several exceptions.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) (part): Saskatchewan: 1909, 9 Geo. V. c. 79, s. 25 (1) part: R. S. M. 1913 c. 55, s. 5 (part): Alberta C. O. c. 34 (4) part].

Clarke (p. 525), said "It may, however, be laid down as a general rule, that all cattle, goods and chattels (with the exceptions hereafter mentioned) which are found upon the demised premises may be distrained for rent, whether they be the effects of the tenant or a stranger," citing Gilbert (Rents) 33 and 3 Steph. Com. (11th ed.) 262: Bell (p. 289) expresses it in the same way—each referring to the statutory changes, and see per Lamont, J.A., in *Theatre Amusement Co., Ltd. v. Reid* [1919] 2 W. W. R. 63 [Sask.] p. 67, citing *Lyons v. Elliott* (1876) 1 Q. B. D. 210, 45 L. J. Q. B. 159 and p. 68, citing Bell (289).

The provinces of Alberta, Manitoba, Ontario and Saskatchewan as will appear, changed the former rule by statutory enactment so that in those provinces the "rule" is now as stated above. In British Columbia, New Brunswick and Nova Scotia the general rule is as stated in Clarke. The exceptions to this Rule are set out at p. 474, *post*.

The words in brackets [ ] are the words of the Ontario Act.

### *Goods of Lodgers.*

The Ontario Landlord and Tenant Act, R. S. O. 1914 c. 155, s. 32 (1) provides that "if a superior landlord distrains or threatens to distrain goods or chattels of a boarder or lodger for arrears of rent due to him by his immediate tenant, the boarder or lodger may serve the superior landlord, or the bailiff or other person employed by him to levy the distress, with a statutory declaration

made by the boarder or lodger setting forth that the immediate tenant has no right of property or beneficial interest in such goods or chattels and that they are the property or in the lawful possession of such boarder or lodger, and also setting forth whether any and what amount by way of rent, board or otherwise is due from the boarder or lodger to the immediate tenant; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the goods and chattels mentioned in the declaration, and the boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by him, the amount, if any, so due, or so much as is sufficient to discharge the claim of the superior landlord."

An inventory annexed to and referred to in a declaration signed by the lodger is sufficiently "subscribed": *Godlonton v. Fulham and Hampstead Property Co.* [1905] 1 K. B. 431.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 4.

New Brunswick: C. S. N. B. 1903 c. 153, s. 15 (1).

Nova Scotia: R. S. N. S. 1900 c. 172, s. 15 (1) (2), (3).

Saskatchewan did not copy these provisions in 1919.

"If the superior landlord, bailiff or other person, after being served with the declaration and inventory, and after the boarder or lodger has paid or tendered to him the amount, if any, which by sub-section 1 the boarder or lodger is authorized to pay, levies or proceeds with a distress on the goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person shall be guilty of an illegal distress, and the boarder or lodger may replevy such goods or chattels in any Court of competent jurisdiction; and the superior landlord shall also be liable to an action at the suit of the boarder or lodger, in which the truth of the declaration and inventory may be inquired into": R. S. O. 1914 c. 155, s. 32 (2).

The clause preserving the remedy by action against the landlord is not exclusive and an action will lie against the bailiff as well: *Page v. Vallis* (1903) 19 T. L. R. 393,



overruled; *Lowe v. Darling* (1906) 22 T. L. R. 779 [1905] 2 K. B. 501; [1906] 2 K. B. 772 [Div. Ct.] 26 C. L. T. 688.

*Gray v. Harris* (1903) 35 N. S. R. 519, turned upon a question of pleading in which s. 15 of the [N. S.] Act was considered.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 5.

New Brunswick: C. S. N. B. 1903, c. 153, s. 15 (2) and 15 (3) part: while 15 (4), (5) and (6) correspond to ss. 15 (5), (6) and (7) of the Nova Scotia Act.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 15 (5) [part] provides for an application to a county court Judge for an order for restoration of the chattels instead of replevin. It provides for the hearing [s. 15 (6)] and preserves the civil action [s. 15 (6)], also penalties for false declarations.

Any payment made by a boarder or lodger pursuant to s.s. 1 shall be a valid payment on account of the amount due from him to the immediate tenant: R. S. O. 1914 c. 155, s. 32 (3).

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 6.

New Brunswick: C. S. N. B. 1903 c. 153, s. 15 (3), part.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 15 (4).

Where the lessee hires rooms which substantially embrace the whole of a large house, the lessor only retaining possession of the housekeeper's room in the basement and two or three empty attics and a stable, and the hiring is bona fide, the lessee will be entitled to the protection of the Act as a lodger: *Phillips v. Henson* (1877) 3 C. P. D. 26; 47 L. J. Q. B. 273. If a landlord reserving a room in a house lets the rest of it to a person, but retains such control and dominion over it as is usually retained by masters of houses let in lodgings, the relation of landlord and lodger may exist between the parties, although the lodger has the right of exclusively occupying the greater part of the premises, and has separate and uncontrolled power of ingress and egress, and

neither the landlord nor his agent sleeps or resides in the house, and the lodger acts as caretaker of the part reserved: *Ness v. Stephenson* (1882) 9 Q. B. D. 245.

And see the notes to Article 2, and *Rees v. McKeown* (1882) 7 A. R. 521; *Newcombe v. Anderson* (1886) 11 O. R. 665.

Under the statute a boarder or lodger must make a fresh declaration each time a distress is levied on his goods. A declaration made at the time of levying one distress will not protect him against a second and subsequent distress. The declaration must be made after the distress against which protection is sought has been levied, or at all events authorized or threatened: *Thwaites v. Wilding* (1883) 12 Q. B. D. 4; 53 L. J. Q. B. 1 (C. A.).

A declaration made by a lodger under the Act need not state that the declarant is a lodger, or whether or no any rent is due from the lodger to the immediate landlord, when no rent is in fact due.

A declaration not setting forth that any rent is due must be read as stating that no rent is due: *Ex parte Harris* (1885) 16 Q. B. D. 130; 2 T. L. R. 167 [C. A.].

Where a lessee makes a sub-lease which is subsisting, the lessee may authorize his lessor to distrain on the sub-lessee, and such distress will be valid for rent due on the original lease: *Laur v. White* (1867) 18 U. C. C. P. 99.

Though the judgment does not make the point clear, it seems that if the original lessor had to rely on authority from the lessee to distrain on the sub-lessee, it could only be for the sum due by the latter to his lessor. But if no such authority be required the distress might (apart from the provisions of the Statute, exempting the goods of third persons, as to which see p. 463, *post*) be for the whole sum due the distrainor, the goods being on the demised premises.

It is clear that, in the absence of a statute to the contrary, the goods of a sub-lessee may be distrained for rent due by his lessor: *Lynch v. Bickle* (1867) 17 U. C. C. P. 549; *Leonard v. Buchanan* (1849) 6 U. C. R. 407;

*Arnsby v. Woodward* (1827) 6 B. & C. 519; *American Con. Must. Cor. v. Hendry* [*ante*, p. 443].

### *The Statutory Exceptions.*

By R. S. O. 1914 c. 155, s. 31 (1) part.

“A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises.”

### *Similar Legislation.*

The Statutes are noted at p. 459, *ante*.

The Act should be construed liberally, and goods belonging to the tenant's wife but temporarily on the premises and covered by a chattel mortgage have been held exempt from distress as against the mortgagee: *Stott v. Spain* (1892) 28 C. L. J. 469 Co. [Co. Ct. York]; *Farewell v. Jameson*, p. 464, *post* (1896) 26 S. C. R. 588, at p. 592.

Goods in a store managed or controlled by an agent or clerk for the owner of such goods where the clerk or agent is also tenant and in default and the rent is due in respect of the store rented therewith and thereto belonging are not exempted by this section, if they would otherwise have been liable to seizure—s. 31 (2). This provision was not copied in the Saskatchewan 1919 Act.

### *Landlord—Tenant.*

By R. S. O. 1914 c. 155, s. 31 (3) “subject to the provisions of s. 34 [see p. 452] ‘tenant’ in this section shall include a sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether or not he has attorned to or become the tenant of the landlord.”

Saskatchewan did not copy this provision in 1919, but by cap. 79, s. 25 (2): provided that “tenant” means a person holding directly of the landlord.

And see the judgment of Beck, J., in *Re Calgary Brewing and Malting Co.* (*infra*), and Newlands, J., in *Anderson v. Scott* (*infra*).

The sections received consideration in *Farewell v. Jameson* (1896) 26 S. C. R. 588; 17 Occ. N. 2. There J. was the owner of premises which he leased to A., who assigned the lease to L. L. put up a notice that the premises were to let and to apply to P. The plaintiffs were let into possession by P., who leased to them—although they knew he was merely an agent to let for L. J. distrained on their goods. Armour, C.J., held that they were in “under” L. and he was affirmed by a Divisional Court (1895) 27 O. R. 141; 16 Occ. N. 51. This decision stood upon an even division in the Court of Appeal: (1896) 27 A. R. 517; 16 Occ. N. 211, Hagarty, C.J.O., and Osler, J.A., affirming, and Burton and MacLennan, J.J.A., dissenting from the judgment of the Divisional Court. The Supreme Court allowed an appeal, holding that *Doe dem. Johnston v. Baytup* (1835) 3 A. & E. 188, did not apply and that the plaintiffs were not in under L. and J.’s distress was illegal.

“I think ‘*landlord*’ means, (1) the lessor—if he has not transferred the reversion or assigned the rent, or (2) the transferee of the reversion or the assignee of the rent, and in this event the lessor is excluded. Similarly, I think ‘*tenant*’ in all places where it occurs, means, either (1) the lessee, if he has not assigned his leasehold interest, or (2) the assignee for the time being of the lessee, and this by virtue of the privity of estate and in this case the lessee is excluded. Thus ‘*landlord*’ means the person who is entitled to exact payment of the rent and the ‘*tenant*’ is the person who, by reason of his possession or occupancy or his rights thereto, whether by privity of contract or estate, for the time being holds the premises under title immediately or mediately from the landlord or his predecessor in title, and by reason of his so holding is the person liable for the time being to pay rent—or, to put it in still another way, during the course of the existence of a term of years the persons who are respectively landlord and tenant may—one or both—change

from time to time, and the enactment refers to the persons who, for the time being, stand in the relationship of landlord and tenant. The words 'or person who is liable for the rent' are meant, I fancy, only to be interpretative of the word 'tenant' . . . " Beck, J., in *Re Calgary Brewing and Malting Co.—Miquelon v. Martin* (1915) 9 W. R. 563 (Alta.)—33 W. L. R. 68.

This decision was approved in *Abbott v. Dahle* [1917] 1 W. W. R. 1393; 33 D. L. R. 207; 10 Alta. L. R. 460.

It seems that this Act would prevent a distress by a superior landlord on the goods of a sub-lessee. The latter cannot be considered "the tenant or person who is liable for the rent" to the former, though he is to his own lessor. Formerly a distress might be made in such case: *Lynch v. Bickle* (1867) 17 U. C. C. P. 549. Now, in Ontario, the superior landlord could only distrain under an authority from the sub-lessor: *Laur v. White* (1868) 18 U. C. C. P. 99.

It has been held in Saskatchewan that a sub-lessee is not a "person liable for rent" within the meaning of s. 4 of c. 51 R. S. S. [now s. 25 (1) of 1919], because the lessor cannot bring an action against him for the same, there being no privity between them: *Holford v. Hatch* (1779) 1 Dougl. 185, followed; *Anderson v. Scott* (1912) 3 W. W. R. 609; 22 W. L. R. 876; 8 D. L. R. 816 [Newlands, J.].

A sub-lessee is not "tenant" within the meaning of s. 4 of ch. 51 R. S. S., following the judgment of Littleton, J., in *The King v. The Inhabitants of Ditchet* (1829); 9 B. & C. 176, at p. 183, defining a tenant as a person who holds of another; he does not necessarily occupy, and the owner may not distrain upon his goods: *Anderson v. Scott* (*supra*).

### *Although the Same are Found on the Premises.*

The goods of a third person cannot be distrained off the demised premises: *Martin v. Hutchinson* (1891) 21 O. R. 388.

At common law the goods of a stranger may be seized, provided they are on the demised premises at the time: *Pidgeon v. Milligan* (1871) 13 N. B. R. 459; *Huskinson v. Lawrence* (1866) 26 U. C. R. 570. A. demised to B. for a certain term and the latter during the term absconded and abandoned the property, leaving no one to occupy it. C., finding the place vacant, put a person in possession and made a demise to D.; and it was held that A. was entitled to distrain under his lease to B., though there was no privity between A. and the person in possession: *Rudolph v. Bernard* (1847) 4 U. C. R. 238.

*Exception 1.*—The goods of a [person claiming title under an execution against the tenant] if they are on the premises, may be distrained for rent.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) part; R. S. M. 1913 c. 55, s. 5 (part)—with the difference noted below; Alta. C. O. c. 34, s. 4 (part); Sask. 1919, 9 Geo. V., c. 79, s. 25 (1) part].

The Ontario section commences as in Article 72 and continues “but this restriction shall not apply in favour of a person claiming title under an execution against the tenant.”

The Manitoba Act on the contrary reads:— “but this restriction shall not apply to *crops or grain* in favour of a person claiming title under or by virtue of an execution or attachment against the tenant,” and then proceeds in the language used in Exception 2, *post*.

The Manitoba section came up for consideration by the Court of Appeal in *Enright v. Little & Brad* [1917] 1 W. W. R. 123; 27 M. R. 80 [C. A.], where it was held that the meaning of the section was that the landlord may distrain on crops or grain on the premises claimed under execution or attachment against the tenant.

*Exception 2.*—The goods of any person whose title is derived by purchase, gift, transfer or assignment, from the tenant, whether absolute or in trust,

or by way of mortgage or otherwise, if they are on the premises, may be distrained for rent.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) (part); Sask. 1919, 9 Géo. V., c. 79, s. 25 (1) (part); Alta. C. O. c. 34, s. 4 (part); R. S. M. 1913, c. 55, s. 5 (part)].

It has been held that while the mortgagee of a tenant's goods is not protected against distress the mortgagee of the goods of any other person, though at one time tenant, is protected: *Re Calgary Brewing and Malting Co.—Miquelon v. Martin* (1915) 9 W. W. R. 563 (Beck, J.), approved in *Abbott v. Dahle* [1917] 1 W. W. R. 1393 [Alta.—App. Div.].

In this case Beck, J., also holds after considering Exception 3 (*post*, p. 468) that only the *tenant's interest* in mortgaged goods is subject to distress. He says (p. 566) of the words of the statute given in Exception 3:

“It seems to me that this should be taken as a legislative recognition that, although at common law only chattels could be distrained, now under the very different conditions of society and business, partial interests in chattels may be distrained.” And see also his definition of “landlord” and “tenant”—as used in the Act—which is given at p. 464, *ante*.

See *Enright v. Little & Brad* [1917] 1 W. W. R. 123; 27 M. R. 80 [C. A.] and the reference to it under Exception 1. It was held that the exception operates in the case of a gift, transfer or assignment *from the tenant*, whether absolute or by way of mortgage, but does not extend to a case where the mortgage has been made by a third party and his equity of redemption has been acquired by the tenant.

In *Libby v. Laird* (1916) 10 W. W. R. 473 [Brown, J.—Sask.] the facts were:—L. shipped a carload of goods to S. and the goods were delivered on the demised lands. S. paid no part of the price. Subsequently L. and S. made an arrangement by which the property in the goods passed to L. absolutely, but by a further verbal arrangement the goods were left on the premises of S. in store for L., but S. was to use such of the goods as desired,

paying L. monthly for the goods so used. The landlord of S. distrained the goods for rent. It was held there was a purchase by L. from S. and the goods were liable—under R. S. S. 1909 c. 51, s. 4 (part), now 1919 c. 79, s. 25 (1) (part)—to be taken to satisfy the landlord's claim for rent.

*Exception 3.*—[The interest of the tenant in] any goods on the premises in the possession of his tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition; may be distrained for rent.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) (part); Saskatchewan 1919, 9 Geo. V., c. 79, s. 25 (1) (part); Alta. C. O. c. 34, s. 4 (part); R. S. M. 1913 c. 55, s. 5 (part); R. S. B. C. 1911 c. 65, s. 3].

This is not properly an exception to the rule as stated in Article 72, but as the seizure of the tenant's interest involves possession of the chattel in its practical result the effect of the statute may be stated thus. The British Columbia Act reads as follows: "In all cases where a landlord distrains for rent on goods in the possession of his tenant, which goods are held by the tenant under a duly filed agreement for hire contract or conditional sale, the landlord shall sell only the interest of the tenant in the goods."

The words in brackets [ ] first appeared in the Ontario Act—then R. S. O. 1887 c. 143, s. 28—in 1890 by an amendment 57 Vic. c. 43, and were first judicially considered in *Carroll v. Beard* (1895) 27 O. R. 349 [MacMahon, J.—Div. Ct.], which dealt principally with the question as to whether the change was retroactive. The Court held also that the landlord could not sell the absolute property in the goods—sold to the tenant under a conditional sale agreement—and by injunction restrained him from selling except subject to the rights of the unpaid vendors.

Although the conditional sale agreement does not comply with the provisions of the Conditional Sales



Ordinance of Alberta (and the reasoning would apply to the statutes of the other provinces—which are set out at p. 874) the vendor may nevertheless set up his claim as against a landlord distraining for rent: *Re Osborne v. Hudson's Bay Co.* (1915) 8 W. W. R. 821; Clary, M.C., points out (p. 822) that “at common law a conditional sale may be made by an informal writing or perhaps oral agreement . . . s. 4 . . . does not say that the exigible ‘interest’ of the tenant in any goods on the demised premises must be an ‘interest’ acquired under conditional sale made in compliance with the Conditional Sales Ordinance, and so far as I can see, neither expressly or impliedly does any other law in force in the province say so . . . (p. 823). A peculiar result, therefore, is that a landlord might get judgment for his rent, issue execution and seize the goods in question, and then if the seller has not complied with the ordinance, he cannot set up his right or title against the landlord, because the latter is now a judgment creditor.”

The same result was arrived at in *Theatre Amusement Co., Ltd. v. Squires and Reid* [1918] 3 W. W. R. 831; 11 Sask. L. R. 411 [C. A.], where the facts were: the plaintiffs held a “lien note for \$1,800” on theatre equipment, but the note was defective in that it did not comply with the Conditional Sales Act. Reid (landlord) distrained for rent (\$1,666.64). Three days later an execution against the tenant was placed in the sheriff’s hands. The equipment was sold for \$2,300. The proceeds were said to consist of two funds: A, the amount of the lienholders’ claim (\$1,800); B., the interest of the tenant (\$500). The landlord was held to have no interest in fund A. Lamont, J.A., said (p. 836):

“The affidavit not complying with the statutory requirement, the plaintiffs’ lien note could not properly be registered. The plaintiffs, therefore, under s. 1 of An Act respecting Lien Notes and Conditional Sales of Goods could not set up any right of property in the goods or right of possession thereto as against the execution creditors of Findlay (the tenant). The statutory restriction, however, operates only in favour of a purchaser or

mortgagee of or from a buyer of the goods in good faith for valuable consideration and in favour of judgments, executions or attachments against such purchaser. As the purchaser's landlord is not mentioned in the section, he does not obtain any benefit from the failure of the conditional vendor to register his lien note."

As to fund B, the landlord was held to have first claim up to the amount of his rent—then the execution creditors. Lamont, J.A., said (p. 834):

"As the ownership of the equipment for which the lien note was given remained in the plaintiffs, all that Reid could seize was the tenant's interest therein, which, but for the injunction, he could have sold to satisfy his claim for rent. The tenant's interest was a right to have the entire property in the goods upon paying of the plaintiffs' lien. This right passed to the landlord, to the extent of his claim when he seized for rent. Reid was entitled to pay the lien note and hold the goods seized as a first security for the amount of the lien paid and his own claim for rent. The goods having been sold for \$2,300, the tenant's interest therein liable for rent was the difference between that sum and the amount of the lien note. On that interest the execution creditors had no claim, the landlord's seizure having been made before there was any execution against the tenant in the sheriff's hands."

The Court also held that the landlord (purchaser) was entitled to retain out of the purchase money the amount he was entitled to as rent: *Ingraham v. McKay* (1912) 46 N. S. R. 518; 8 D. L. R. 132, applied.

The plaintiffs then brought an action against the landlord for damages for conversion, basing the claim upon the landlord's refusal to give up possession of the equipment to the plaintiffs' bailiff, who had a warrant to repossess. McKay, J. [1919], 1 W. W. R. 482, gave effect to the claim, but the Court of Appeal reversed his judgment: *Theatre Amusement Co. v. Reid* [1919] 2 W. W. R. 63, 46 D. L. R. 398 [C. A.].

And Haultain, C.J.S., said, at p. 65:

“In my opinion this section of the Act leaves unimpaired the right of the landlord to distrain on goods on the premises in the possession of the tenant under a conditional sale agreement and only restricts the landlord’s right as to the extent of the interest in the goods which he can sell. In order to complete a distress the goods must be seized and impounded. While the interest of the conditional purchaser is the only thing which can be sold, there is, in my opinion, nothing in the section which takes away the right of the landlord to distrain upon and seize and impound the goods for the purpose of selling that interest. If the above opinion is correct, the defendants were quite justified in refusing to deliver up the goods to the plaintiff and there was no wrongful conversion. See *Re Calgary Brewing and Malting Co., Ltd. (Miquelon, Landlord)* (1916) 9 W. W. R. 563; 33 W. L. R. 68.”

And see the remarks of Lamont, J.A., at p. 69, referring to *Carroll v. Beard* (*supra*):

“This view seems to me to be supported by *Carroll v. Beard* (1895), 27 O. R. 349. In that case the landlord distrained for the goods held under a conditional sale agreement and advertised the same for sale. The plaintiffs brought an action, and obtained an interim injunction restraining the defendant from selling the goods seized except subject to the interest of the plaintiffs as unpaid vendors. In giving judgment MacMahon, J., p. 355 (27 O. R.) said: ‘And, as under 57 Vict. c. 43, the landlord shall distrain only the interest of the tenant in any goods on the premises under a contract by which he is to become the owner thereof upon the performance of any condition, the landlord could not sell the absolute property in the goods, even if any rent were due, as to which there was no evidence. There must be an order perpetually restraining the defendants from selling the property except subject to the rights of the plaintiffs as unpaid vendors.’ This judgment was affirmed on appeal. It is true that the plaintiffs in that case did not seek to establish a right to take the goods out of the possession of the landlord, but simply that he sell them subject to their rights

as vendors. But even had they sought that right, the judgment, in my opinion, must have been the same. The landlord's clear right to distrain and sell the tenant's interest must be given effect to, and I cannot see how that could be done if the plaintiffs had the right to take the goods away. Further, I fail to see that the unpaid vendors would be prejudiced by allowing the landlord to keep the goods in his possession until the interest therein of his tenant is sold."

The Supreme Court of Canada dismissed an appeal. Idington and Brodeur, JJ., agreed with the judgment appealed from; Duff, J., dissented and Anglin, J., with whom Mignault, J., concurred, said [1920] 1 W. W. R. 870, at p. 875, 60 S. C. R. 92:

"Assuming, but without so deciding, that the plaintiff under its lien note had a paramount right which, notwithstanding the exception in favour of landlords made by the proviso to s. 4 of the Act respecting Distress for Rent and Extra Judicial Seizures (R.S.S. 1909 c. 51), would have entitled it to possession of the goods although held by the defendants under a lawful distress for rent due by Findlay, that the bailiff Drackett was in error in refusing to recognize such paramount right of the plaintiff, and that actual possession, if obtained when the plaintiff's bailiff demanded it, would have enabled it to hold the goods against creditors of Findlay who might subsequently obtain judgments (but see *G. T. P. v. Dearborn*, 58 S. C. R. 315 [1919] 1 W. W. R. 1005), I am nevertheless of the opinion that the plaintiff cannot succeed in its claim for damages for conversion of them by the defendants, because the evidence does not establish that at the time of the only demand for possession made on its behalf the defendants were in possession of the goods, or that a withdrawal of the landlord's claim would have enabled the plaintiff to obtain possession."

In *Re Calgary Brewing and Malting Co., Ltd.; Miquelon v. Martin* (1915) 9 W. W. R. 563; [Alta.] Beck, J., at p. 566, considers this exception: see the notes to Exception 2, p. 466, *ante*.

Where the plaintiff sold machinery to a purchaser, upon a registered conditional sale agreement, and the machinery was upon the publisher's rented premises, Harvey, C.J., held that the publisher's landlord could distrain for rent only upon the publisher's interest in the machinery subject to the agreement, and the plaintiffs were entitled to the cost of an action brought to restrain the landlord from distraining and selling the machinery: *Miller & Richard v. Angus* (1911) 19 W. L. R. 548 [Alta.].

And see *Hackney Furnishing Co. v. Watts* [1912] 3 K. B. 225; *Shenstone v. Freeman* [1916] 2 K. B. 84, and *Rogers v. Martin* [1911] 1 K. B. 19.

*Exception 4.*—Goods exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or right of distress by the landlord, if on the premises, may be distrained for rent.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) part: Saskatchewan: 1919, 9 Geo. V., c. 79, s. 25 (1) part: Alberta C. O. c. 34, s. 4 (part) R. S. M. 1913, c. 55, s. 5 (part)].

*Exception 5.*—The goods of a wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant, or any other relative of his, in case such relative lives on the premises as a member of the tenant's family, may be distrained for rent if upon the premises.

[Authorities: R. S. O. 1914, c. 15, 31 (1): Saskatchewan Statutes 1919, 9 Geo. V., c. 79, s. 25 (1) (part): Alberta: C. O. c. 34, s. 4 (part): R. S. M. 1913 c. 55, s. 5 (part)].

In *Barlow v. Breeze* [1917] 1 W. W. R. 270 [B. C.—C. A.] the Court did not decide whether goods sold under a conditional sale by a wife to a husband, but only partially paid for, were not within the protection of the Act, because if they were not the landlord could only deprive the plaintiff of them by a lawful distress and sale which had not been done.

*Exception 6.*—The property claimed by a person whose title is derived by purchase, gift, transfer or assignment from any of the relatives coming within Exception 5 (*ante*), may be distrained for rent.

[Authorities: R. S. O. 1914 c. 155, s. 31 (1) part; R. S. M. 1913 c. 55, s. (part); Saskatchewan Stats. 1919, 9 Geo. V., c. 79, s. 25 (1) (part)].

*The Rule in British Columbia, New Brunswick and Nova Scotia.*

This Rule has already been stated at p. 459, *ante*.

*The Exceptions.*

There are, however, exceptions to this Rule, as follows:

*Exception A.*—Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed, in the way of his trade or employ, are absolutely exempt from distress, although there are no other goods on the premises.

[Authorities: *Simpson v. Hartopp* (*ante*, p. 451); *Mitchell v. Coffee* (1881) 5 A. R. 525].

This exemption is founded on public policy for the benefit of trade: *Patterson v. Thompson*, *post*, p. 475.

But there must be a delivery; and where a tenant built a ship on his own premises and furnished all the material, the owner supplying none, it was held that there was no delivery to be worked up in the way of trade and therefore no protection: *Clarke v. Millwall Dock Co.* (1886) 17 Q. B. D. 494; 55 L. J. Q. B. 378 [C. A.].

The principle of the cases seems to be that if articles are sent to a place to remain there, they are distrainable; but if sent for a particular object and the remaining at the place be an incident necessary for the completion of that object, they are not: *Parsons v. Gingell* (1847) 4 C. B. 545; 16 L. J. C. P. 227.

A reaping machine was distrained on premises leased to one G., from whom the plaintiff, a hotel keeper, had the use of the yard and stable, and it appeared that the machine had been left at the hotel about six months before by one R., an agent for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except, perhaps, on one occasion, and that the plaintiff was paid nothing for keeping the machine nor did he assume any responsibility therefor; it was held that the machine was not exempt from distress, for the keeping of machines in this way was not essential to the business of keeping an hotel, the evidence merely showing that a refusal to do so would or might render the hotel less popular: *Mitchell v. Coffee* (1881) 5 A. R. 525.

The business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber: *Patterson v. Thompson* (1882) 46 U. C. R. 7; and therefore logs delivered to a mill owner in the way of his trade to be sawn into deals for remuneration, are privileged from distress, but not where the tenant is a joint owner with other persons in the logs: *Guy v. Rankin* (1883) 23 N. B. R. 49; *Patterson v. Thompson* (1883) 9 A. R. 326.

Where scows belonging to a third person were lying in a slip over which the tide ebbed and flowed, and which was with the knowledge of the lessors used by all persons as a public slip or landing place, in which their ships were accustomed to lie in the ordinary course of loading and unloading their cargoes; and the scows were there in the course of trade; it was held that they were not liable to be distrained for rent due, when all the interest of the lessee of the slip had been surrendered before the rent fell due: *Hammond v. Johnston* (1845) 5 N. B. R. 161.

Articles undergoing repairs by a tenant in the way of his trade are exempt from distress. M., a shipbuilder, carried on his business in a yard leased from A. Two vessels were sent to be repaired, but M., not having sufficient means, it was agreed that the owner should furnish the materials, and he purchased from M. for the purpose

of repairs, etc., some oak timber then in the yard. The owner's foreman took possession of it, and a portion had been worked up by his and M.'s men, when A. distrained both it and the vessels for rent; but it was held that both were exempt from distress, and that there was a sufficient change of possession of the timber to dispense with a registered instrument: *Gildersleeve v. Ault* (1858) 16 U. C. R. 401.

A horse standing in a smith's shop to be shod, materials sent to a weaver, or cloth to a tailor to be made up, and the like, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are: *Co. Lit. 47a*; *Gisbourn v. Hurst* (1710), 1 Salk. 249; *Gibson v. Ireson* (1842) 3 Q. B. 39.

An artist does not exercise a public trade, so that pictures being painted on his premises would be privileged from distress. No materials are supplied to him, as he supplies his own canvas, colours and genius: *Von Koop v. Moss* (1891) 7 T. L. R. 500.

A boat sent by the owner to some salt works and left a reasonable time in a canal on the premises for the purpose of being loaded with salt, is not privileged from distress: *Muspratt v. Gregory*, 1 M. & W. 633; (1836) 3 M. & W. 677.

Goods sent to an auctioneer to be sold on premises occupied by him, or in an open yard belonging to premises in his occupation, are privileged from distress: *Adams v. Grane* (1833) 1 Cr. & M. 380; *Brown v. Arundell* (1850) 10 C. B. 54; 20 L. J. C. P. 30; *Williams v. Holmes* (1853) 8 Exch. 861; 22 L. J. Ex. 283. But this privilege is confined to goods on the premises of the auctioneer, and does not extend to goods sold on other premises, whether such goods belong to the owner of the premises or a stranger: *Lyons v. Elliott* (1876) 1 Q. B. D. 210; 45 L. J. Q. B. 159. Where goods are sold by auction and become the property of the purchaser on such sale, the latter would have to bear the loss in case of distress by the landlord of the auction room: *Sweeting v. Turner* (1872) L. R. 7 Q. B. 310; 41 L. J. Q. B. 52; 20 W. R. 185.



Household furniture deposited at a warehouse for storage purposes is privileged as being necessary to trade and the very existence of the business: *Miles v. Furber* (1873) L. R. 8 Q. B. 77; 42 L. J. Q. B. 41.

The above cases would, in the other provinces, all come within the protection of the Statute, noted at p. 463.

*Exception B.*—Goods of a principal in the hands of a factor for sale are privileged from distress for rent.

Goods were consigned to R. by the plaintiff with certain prices affixed in the invoice below which he was not to sell, and all above which he might keep for himself. It appeared that R. was in the habit of transferring them when convenient in payment of his own debts, charging himself with them as sold at the invoice prices. He was, therefore, not paid by commission on the sales, and it was held that the goods were not exempt from distress for rent due by R.: *Hurd v. Davis* (1864) 23 U. C. R. 123.

An agent under an agreement with a firm of carpet manufacturers, took premises and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for one other firm only; it was held that the agent was not carrying on a public trade so as to exempt his principal's goods on his premises from distress: *Tapling v. Weston* (1883) C. & E. 99.

Goods landed at a wharf and consigned to a broker, as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody, until an opportunity for selling them should occur, were held not distrainable for rent due in respect of the wharf and warehouse, as they were brought to the wharf in course of trade, and were consequently protected: *Thompson v. Mashiter* (1823) 2 Bing. 283; 8 Moo. 254. So corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself: *Matthias v. Mesnard* (1826) 2 C. & P. 353.

Goods pledged with a pawnbroker are not distrainable for rent due from him, notwithstanding they have remained in his possession without any interest being paid long enough to be forfeited and liable for sale: *Swire v. Leach* (1865) 18 C. B. N. S. 479; 34 L. J. C. P. 150.

*Exception C.*—The R. S. N. S. 1900, c. 172, s. 7, exempts any property not belonging to the tenant, which is in any building used as a market bona fide for the purpose of sale; but the person claiming exemption must be using the premises as a market at the time: and see *Bent v. McDougall* (1882) 14 N. S. R. 468; 2 C. L. T. 262, and (1917) 7 Geo. V. c. 43.

### EXCESSIVE DISTRESS.

ARTICLE 73.—While the landlord is not bound to calculate very nicely the value of the property seized, yet the excess of value of the goods above the arrears of rent must not be unreasonably great [and a distrainor who takes an excessive distress is liable in damages to the owner of the goods and chattels distrained].

[Authorities: *Seigman v. Gale and Miller* (1915) 9 W. W. R. 729; (Simmonds, J., at p. 730): 33 W. L. R. 117 (Alta.); *Pettit v. Kerr* (1888) 5 M. R. 539. The Statutes noted under].

#### *The Statutes.*

By the Statute of Marlebridge, 52 Hen. III, c. 4 (part) distresses shall be reasonable, and not too great; and they who take unreasonable and undue distresses shall be grievously amerced for the excess of such distresses.

#### *Similar Legislation.*

Ontario: R. S. O. 1914 c. 155, s. 42, providing that “distress, whether for a debt due to the Crown or to any

person shall be reasonable," and s. 54 in the words in brackets [] in Article 73.

Saskatchewan: The Statute of 1919, 9 Geo. V. c. 79, ss. 22 and 36 (1) were copied from the Ontario Act.

See the provisions of the Manitoba Act noted at p. 391, and of the Alberta Act noted at p. 439.

The excess must be considerable: *Field v. Mitchell* (1807) 6 Esp. 71.

But a distress should not extend to the whole of growing crops where part would be clearly sufficient: *Piggott v. Birtles* (1836) 1 M. & W. 441; 5 L. J. (Ex.) 193; and if the tenant sustain actual loss by such distress he may recover: *Rodgers v. Parker* (1856) 18 C. B. 112.

If there be no other distress on the land, the taking of one entire thing, though of considerably greater value than the rent, is not excessive: *Avenell v. Croker* (1828) Moo. & M. 172; *Roden v. Eyton* (1848) 6 C. B. 427; 18 L. J. (C. P.) 1.

Where the rent due was \$401, and the value of the goods distrained was \$469, it was held that the difference was insufficient to support an action for excessive distress, though the party whose goods were taken was not the tenant: *Huskinson v. Lawrence* (1865) 26 U. C. R. 570.

But, where corn and flour to the value of £200 were distrained for £121, it was held excessive: *Chandler v. Doulton* (1865) 3 H. & C. 553; 34 L. J. Ex. 89.

In *Hessey v. Quinn* (1910) 21 O. L. R. 519; 1 O. W. N. 1039; 16 O. W. R. 628 [Div. Ct.], Middleton, J., delivering the judgment of the Court, said, at p. 520: "The right to damages for excessive distress given by the Statute of Marlebridge was not interfered with or modified by the Imperial Statute 11 Geo. II. c. 19, s. 19 [see p. 510, *post*]. These statutes somewhat modified in language but substantially the same, are now found in R. S. O. 1897 c. 342," [now R. S. O. 1914 c. 155]. He pointed out that the contrary statement in Foa, 3rd edn., p. 528, is not supported by *Whitworth v. Smith* (1832) 5 C. & P. 250, cited as the authority for it, and went on to say, p. 521, "The true view is, that the statute

is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress: *Rodgers v. Parker* (*ante*); *Lucas v. Tarleton* (1858) 3 H. & N. 116; *Piggott v. Birtles* (*ante*), and *Chandler v. Douulton* (*ante*), show that in the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and that some damage may be presumed: *Black v. Coleman* (p. 450) is also in point. But even when the statute read that in such cases the landlord should be 'grievously amerced' nominal or 'nearly nominal' damages were allowed, unless substantial damage was shown. The cases cited give as indications of real damage: (1) deprivation of the custody and use of the excess taken; (2) deprivation of the power of selling while in custody; (3) extra expense in replevin proceedings," [and see also *Megson v. Mapleton*, p. 486, *post*]. "Upon the evidence in this case there has been no substantial damage. The bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods, and as replevin was granted upon payment into Court of the rent due, there is nothing upon which to found an award of more than nominal damages." Judgment of Osler, J.A., 20 O. L. R. 442, varied: see p. 483, where this case is also referred to.

*McDougall v. Kerr* (1908) 8 W. L. R. 528 [Alta.—Stuart, J.] held that a seizure of groceries and fixtures was not excessive, on the facts, and the Court was of the opinion that damages could not be recovered for seizure for an excessive claim without a tender of the amount actually due.

In *Armstrong v. Sherlock* (1907) 9 O. W. R. 118 [Div. Ct.] it appeared that the rent due was \$231. A distress was made for \$393—the balance being for rent of certain tools, but by notice served on the tenant several days before the sale the landlord undertook not to make out of the goods more than \$231. No tender of this amount was made at any time. Falconbridge, C.J.K.B., held that there was no excessive distress; (1906) 8 O. W. R. 577, affirmed (1907) 9 O. W. R. 118 [Div. Ct.].

A distress warrant authorized the distress of goods and chattels liable to be distrained and all the tenant's goods and chattels which had been removed. The bailiff seized everything he could find. The rent distrained for was only \$75. It was held that as the landlord had allowed the goods to be advertised for sale and had resisted an injunction to restrain such sale, knowing the distress was excessive, he was liable for his bailiff's acts: *Lewis v. Read* (1845) 13 M. & W. 834, distinguished; *McClellan v. Simpson* (1908) 6 O. W. R. 1260 [Mulock, C.J.].

A landlord distrained for rent due, and also at the same time for rent not due, and thus levied a larger sum than was really due, but the original entry and the distress itself were both lawful, and as the whole proceeding was one continuous act, the case was held analogous in principle to an excessive distress: *Kendrick v. Lee* (1838) 6 U. C. Q. B. O. S. 27.

The question of excess is always for the jury, even where, by the bailiff's valuation and the actual proceeds of the sale, the goods distrained appear to have been insufficient to satisfy the rent and expenses; but in such case there must be strong evidence that the goods were of much greater value than what they sold for: *Smith v. Ashforth* (1860) 29 L. J. Ex. 259.

If the distress is for less than the sum due, it is wrong, if for more, it is only ground for excessive distress; but there would be no illegal taking, and no pretence for an action of trespass, if the landlord had a right to distrain for anything: *Sheeran v. O'Connor* (1857) 15 U. C. R. 418.

When the distress is only excessive or irregular, provided some rent is due, the tenant is not entitled to treat the landlord, or other person distraining, as a trespasser, but only to sue for the damages actually sustained; nor can the person in possession of the goods be sued for a conversion of them: *Pettit v. Kerr* (1888) 5 M. R. 359.

An excessive distress assumes, of course, that some rent is due; and the action cannot be sustained unless it appear that the goods seized and sold were excessive with

reference to the amount of the actual arrears: *De Grouchy v. Sievret* (1890) 30 N. B. R. 104; *Owen v. Taylor* (1878) 39 U. C. R. 358.

Malice need not be shown in an action for excessive distress, whether brought by the tenant or a stranger: *Huskinson v. Lawrence* (*ante*).

Though the distress should not be made for more rent than is really owing, yet, if there be any doubt or dispute on that point, and no tender has been made by the tenant, the landlord may, with comparative safety, distrain for all that he claims, although in the result it appears to be more than is really in arrear and unpaid: *De Grouchy v. Sievret* (*ante*).

Where the distress is excessive, and the tenant pays the amount demanded, he is in the same position as if the goods had been sold, and is entitled to recover back the excess, with the actual damage sustained, but not the expenses of the distress, or the rent actually due: *Netting v. Hubley* (1894) 26 N. S. R. 497.

In *Piche v. Montgomery* (1902) 1 O. W. R. 325 [Div. Ct.] it was held upon the facts that the distress was not excessive.

The right to bring an action for excessive distress is not confined to the tenant.

A stranger, whose goods are seized for the tenant's rent, is in no other or better position than the tenant himself, [unless his goods are not liable to seizure: see p. 458 *ante*] and, if the distress be for more than is due, he must show a tender of the proper sum, for, though he could not make such tender, he could avail himself of one made by the tenant; and, if he sues for excessive distress, he should show that the distress was excessive and unreasonable, or that the proceeds were more than reasonably sufficient. But if he shows a seizure for arrears of rent of goods of greater value than such arrears and costs, although a small part would have sufficed, and although the tenant's goods also distrained were of themselves sufficient, and that thus an excessive and unreasonable distress was made, it is not necessary to go further

and allege malice, for the statute only provides that distress shall be reasonable, and not too great: *Huskinson v. Lawrence* (*ante*), and see *Wallace v. Gilchrist* (1874) 24 U. C. C. P. 40.

A declaration contained two counts, one in trespass for unlawful distress for rent, the other for excessive distress. The distress referred to in both counts was the same. In support of the first count, the plaintiff swore that the defendant had agreed not to distrain, and also gave material evidence to support the second count. The jury gave a general verdict for the plaintiff for \$1,000 damages, and stated that they found the damages for the excessive distress to be \$1,000. The verdict having been entered generally for the plaintiff on both counts, it was held that, as the claims of the plaintiff under the two counts were inconsistent, he should have elected at the close of the evidence on which count he intended to proceed, and that he could not then make his election: *Preston v. Appleby* (1888) 27 N. B. R. 92, and see *Gibbons v. Hatfield* (1919) 46 N. B. R. 96.

Where, in an action for excessive distress, the law was correctly stated to the jury, who found a verdict for the defendant, the Court refused a new trial, though they were of opinion there was excess, which might have entitled the plaintiff to a verdict for nominal damages only; a new trial under such circumstances being grantable only on payment of costs: *Ruel v. Beer* (1857) 8 N. B. R. 369.

The distress was held to be excessive in *Hessey v. Quinn* (1910) 20 O. L. R. 442; 15 O. W. R. 505; 1 O. W. N. 515 (Osler, J.A., who made "every allowance which is usually made in such cases"); 21 O. L. R. 519; 16 O. W. R. 628; 1 O. W. N. 1039 [Div. Ct.] (damages reduced): *Spain v. McKay* (1910) 7 E. L. R. 503, 529—(to the extent of one month's rent—one dollar damages allowed), and not to be excessive in *Seigman v. Gale and Miller* (*ante*).

The question of illegal distress when no rent is due is discussed in Article 52, *ante*, p. 379, and irregularities in the course of a lawful distress in Article 81, p. 510, *post*.

## INVENTORY.

ARTICLE 74. — After seizure the bailiff should make an inventory of the goods sufficiently full and complete to inform the tenant of the goods distrained, so that he may, if necessary, issue a writ of replevin for them.

[Authorities: *McDermott v. Fraser* (1915) 8 W. W. R. 196 at p. 200; 23 D. L. R. 430; 25 M. R. 298 [Curran, J.].

The following inventory, "one clock and weights, etc., and any other goods and effects that may be found in and about the premises to pay the said rent and expenses of this distress," was considered objectionable, and was held sufficient only on the ground that the distress was in fact meant to include all the goods on the premises: *Wakeman v. Lindsey* (1850) 14 Q. B. 625.

The tenant may waive an inventory and advertising: *Whimsell v. Giffard* (1883) 3 O. R. 1, noted at length at p. 513, *post*.

But the waiver of an inventory will not dispense with a notice of distress: *Shultz v. Reddick* (1882) 43 U. C. R. 155.

The form of inventory is prescribed by C. S. N. B. 1903, c. 153, s. 9.

The notice of distress is considered under Article 81, *ante*, p. 510.

## DEMANDS AND COSTS.

ARTICLE 75.—In some provinces every person who makes and levies any distress shall give a copy of demand and of all costs and charges of the distress, signed by him, to the person on whose goods and chattels the distress is levied.

[Authorities: The statutes noted under].

A sheriff who distrains as a bailiff under the Distress Act, R. S. B. C. 1911, c. 65, is governed as to his rights by that Act, and when he is withdrawn from possession



upon payment of rent and tender of fees he is not entitled to fees as on a sale or to poundage: *Bancroft v. Richards* (1913) 3 W. W. R. 825; 23 W. L. R. 74; 9 D. L. R. 77—[B. C.—C. A.].

### *The Statutes.*

By the Costs of Distress Act, R. S. O. 1914 c. 78, s. 16, a person who makes distress shall give a statement in writing of the demand and of all costs and expenses of the distress, signed by him, to the person on whose goods and chattels the distress is made.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 22.

Manitoba: R. S. M. 1913 c. 55, s. 6.

These Acts are general in their application, and cannot be confined only to cases where the effects of boarders or lodgers are in question. But the omission to give the notice does not subject the landlord in damages to the difference between what the goods were sold for and what they should properly have been sold for: *Vaughan v. Building and Loan Co.* (1880) 6 M. R. 289; *McDermott v. Fraser* (1915) 8 W. W. R. 196 [Curran, J.].

These Acts do not apply where the goods have not been sold: *Hills v. Street* (1828) 5 Bing. 39.

Where they do apply, the landlord, not personally interfering in the distress, is not liable for the omission of the bailiff to give a copy of his charges: *Hart v. Leach* (1836) 1 M. & W. 560.

It would seem that these Acts do not increase the sum the landlord is to receive. The bailiff or person employed in making the distress will be entitled to the percentage fixed by the Acts: *Philipps v. Rees* (1889) 24 Q. B. D. 17; 59 L. J. Q. B. 1. Where in an action on the case for excessive distress a count charged the landlord with selling the goods for extortionate and illegal charges, it was held that the fees being charged by the bailiff he alone was liable under the 1 Vic. c. 16, s. 4, of which the R. S. O. is a continuation: *Nichols v. Mooney* (1844) 1 U. C. R. 199.

Where the bailiff seizes more goods than his authority warrants and makes an excessive charge for costs, the landlord will be responsible for his act and liable to the tenant under the R. S. O. c. 78. Any money paid to the latter by the landlord in settlement of the excessive charge for costs may be recovered from the bailiff: *Megson v. Mapleton* (1883) 49 L. T. 744; 32 W. R. 318.

“These proceedings [*i.e.*, those outlined in this and the following articles] are required in the interest of the tenant and for his protection. Are they essential to the validity of the distress? I do not think so. Failure to comply with them renders the sale of the goods distrained irregular, but does not make the distress illegal: *Trent v. Hunt* (1853) 9 Ex. 14; 22 L. J. Ex. 318”: per Curran, J., in *McDermott v. Fraser* (*ante*), at p. 201.

The costs and fees which may be demanded and taken in the various provinces are governed by the following Acts:

Alberta: C. O. c. 34, s. 1; Stats. 1914 c. 4 (1).

British Columbia: R. S. B. C. 1911 c. 65, s. 21, as amended in 1913 by c. 17, s. 3, and 1914 by c. 21, s. 2.

Manitoba: R. S. M. 1913 c. 55, ss. 7 and 8; (1919) 9 Geo. V. c. 25, s. 1.

New Brunswick: C. S. N. B. 1903 c. 188, c. 153, s. 23.

Nova Scotia: R. S. N. S. 1900 c. 185.

Ontario: R. S. O. 1914 c. 78, s. 2 (1), (2).

Saskatchewan: Stats. 1919, 9 Geo. V. c. 25, s. 2.

The Acts also provide penalties for breach of the above provisions.

Alberta: C. O. c. 34, s. 3; Stats. 1914 c. 4 (1).

British Columbia: R. S. B. C. 1911 c. 65, ss. 23 to 30, both inclusive, corresponding to ss. 6, 12, 13, 9, 7, 8, 10 and 15, respectively, of the Ontario Act.

Manitoba: R. S. M. 1913 c. 55, s. 9.

Ontario: R. S. O. 1914 c. 78, ss. 6 to 16; s. 15 preserves every right of action the tenant may have in addition to the summary proceedings before the Justice.

Saskatchewan: (1915) 5 Geo. V. c. 43, s. 3; (1919) 9 Geo. V. c. 25.

## IMPOUNDING.

ARTICLE 76.—Goods distrained should be impounded.

[Authorities: *McDermott v. Fraser* (1915) 8 W. W. R. 196, 200; 25 M. R. 298; 23 D. L. R. 430 [Curran, J.], and see *Ritchie v. Snider* (1914) 28 W. L. R. 735, at 737 [Alta.—Walsh, J.].

After distress the safest course is to remove and impound the goods immediately, or if the tenant agree to delay or to their remaining on the premises, a written consent should be procured for their production when demanded: *Black v. Coleman* (1879) 29 U. C. C. P. 507.

Questions of tender may arise before impounding [as to which see p. 411, *ante*], but after that they are in the custody of the law. Goods *in custodia legis* are referred to at p. 514.

The landlord should remove the goods from the tenant's premises at the end of the five days allowed the tenant to replevy [see p. 504, *post*] or within a reasonable time afterwards, otherwise he may be deemed a trespasser for keeping them there: *Griffin v. Scott* (1726) 3 Ld. Raym. 1424. In *Thompson v. Marsh* (1834) 2 U. C. Q. B. O. S. 355, it was held that trespass lay for a seizure and sale of the goods where they had been left on the premises after a distress longer than five days, no person being in charge of them, the seizure and sale for which the action was brought being subsequent to the five days after the first seizure. In such case the full value of the goods cannot be recovered, but only special damages.

Where A. entered under a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises for fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress, it was held that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the occupation of his house, after the time allowed by law: *Winterbourne v. Morgan* (1809) 11 East, 395; 2 Camp. 117n; *Etherton v. Popple-*

*well* (1800) 1 East, 139; *Lynch v. Bickle* (1867) 17 U. C. C. P. 549.

It is usual for the tenant to give a consent for the landlord to remain beyond the five days, as it is for the tenant's advantage that the goods be not sold, or, at all events, not sacrificed by hurrying on the sale; if such consent be given, it is prudent, although not absolutely necessary, to have it in writing: see *Black v. Coleman* (*ante*).

At common law, when a distress was made, the cattle or goods were to be kept in a pound; which is nothing more than a prison for that purpose, and is either overt, that is, public and open overhead, or covert, that is, private and covered or protected from the rain, etc.: Co. Lit. 47b.

Household goods and other things liable to damage from the weather, or which may be easily carried away, should be put in a pound covert: Co. Lit. 47b.

But all animals distrained should regularly be put into a pound overt, because at common law the owner was bound at his peril to sustain them, wherefore they ought to be put into such open place as he could resort to for the purpose; and if they were placed in a private pound, the distrainer was bound to keep them at his peril with provision, for which he had no satisfaction, and if they died for want of sustenance, he was considered answerable for them: 1 Inst. 4; Co. Lit. 47b.

### *The Statutes.*

#### *Impounding Cattle.*

By 1 and 2 Ph. & M. c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake or lathe, where the same is taken, except it be to a pound overt within the same shire, nor above three miles from the place where the same is taken, *nor impounded in several places*, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings and treble damages.

By s. 2, no person shall take for keeping in pound or impounding and distress above fourpence for any one whole distress; and where less has been used, there to take less, on pain of forfeiting £5 to the party grieved, besides what he should take above fourpence.

### *Similar Legislation.*

Ontario: R. S. O. 1914 c. 155, s. 50; ss. 1 and 2, ss. (1), refers to the "Local municipality as defined by the Municipal Act," and "to a fitting pound or enclosure within the same county or district not more than three miles distant from the place where the distress is taken."

Ss. (3) places the penalty at \$20.

Saskatchewan did not copy this provision in 1919: s. 32 [see p. 490, *post*] would, therefore, cover all cases.

Where lands lying in two adjoining counties are let under one demise at one entire rent, and the landlord distrain cattle in both counties for rent in arrear, he may chase them all into one county; but if the counties do not adjoin, it would be otherwise: *Walter v. Rumbal* (1696) 1 Ld. Raym. 53; 1 Salk. 247; 12 Mod. 76; *Woodcroft v. Thompson* (1682) 3 Lev. 48.

The second section does not apply to cases where the goods are impounded on the premises under the 11 Geo. II. c. 19, s. 10, *post*; *Child v. Chamberlain* (1834) 5 B. & Ad. 1049.

See also *Macgregor v. Defoe*, p. 491, *post*.

### *Where Goods May be Impounded.*

By 11 Geo. II. c. 19, s. 10, any person or persons lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress; and may appraise, sell and dispose of the same upon the premises [in like manner, and under the like directions and restraints to all intents and purposes

as any person taking a distress for rent may now do off the premises, by virtue of 2 Wm. & M. Sess. 1, c. 5, or 4 Geo. II. c. 28]; and any person or persons whatsoever may come and go to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise and buy, and also in order to carry off or remove the same on account of the purchaser thereof [and if any pound-breach or rescous shall be made of any goods and chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute].

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 65, s. 18.

New Brunswick: C. S. N. B. 1903 c. 153, s. 10.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 2 (4) and by s. 2 (5) the landlord has the option to remove the goods to another place of impounding or security, and to sell and dispose of the same after the appraisal and notice (as provided by the statute) otherwise than on the premises.

Ontario: R. S. O. 1914 c. 155, s. 50 (4) has not the words in brackets which are replaced by the other sections of the Act noted at p. 496. It should also be observed that not only cattle [see p. 489, *ante*], but goods must—under the Ontario Act—be impounded in one place: s. 50 (2).

Saskatchewan: Stats. 1919, 9 Geo. V. c. 79, s. 32, is copied from the Ontario Act.

In Alberta: No goods seized shall be removed from the premises where the seizure is made before sale without an order such as is required for sale [see p. 498, *post*], unless in the opinion of the officer seizing it would be unsafe to leave them or the goods are perishable: (1914) 4 Geo. V. c. 4, s. 14.

It has already appeared [p. 456, *ante*] that grain loose or in the straw or hay must be impounded on the

premises and [p. 457, *ante*] growing crops on or as near the premises as possible.

A lessor levied a distress upon goods in the premises situate six miles from Toronto, and removed the goods to the city to impound and sell; and it was held that such removal, unless unnecessary and unreasonable or malicious, was not a good ground of action, the city being in the county where the distress took place; but if cattle, horses or sheep were taken, it would have been an abuse so to remove them if a public pound could be found nearer: *Macgregor v. Defoe* (1887) 14 O. R. 87.

The distrainor ought either to put all the goods distrained into one room, and keep possession of that only, or to remove such goods out of the house in the absence of any consent to the contrary; but very slight evidence of such a consent will be sufficient: *Child v. Chamberlain* (1834) 5 B. & Ad. 1049; 3 N. & M. 520; *Washborn v. Black* (1774) 11 East, 405.

Where the impounding is in the premises, one room should be selected, unless the whole house is necessary for the safe keeping of the distress: *Wood v. Durrant* (1846) 16 M. & W. 149; 16 L. J. Ex. 313.

It has been held, that if necessary to secure a distress in a cottage, it might be locked up so as to exclude the tenant altogether: *Cox v. Painter* (1837) 7 C & P. 767.

But it would rather seem that the landlord is never entitled to lock up the whole of the demised premises, so as to exclude the tenant therefrom, except with his express consent; rather than do that he must remove the goods distrained: *Smith v. Ashforth* (1860) 29 L. J. Ex. 259.

If the goods be all put in one room and notice given that they were distrained and impounded, that would be sufficient under the statute. Where, instead of removing the articles, the landlord made up from a list given to him by the tenant an inventory of the furniture in the house, put a man into possession and handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant, but the landlord did not go into the several rooms in which the

articles were, but the tenant assented to what was done; it was held a distress and impounding on the premises; and that a tender afterwards was too late: *Tennant v. Field* (1857) 8 E. & B. 336; 27 L. J. Q. B. 33.

A distrainer is liable for any injury which animals taken on a distress warrant may sustain in consequence of the unfit state of a pound at the time of impounding: *Wilder v. Speer* (1838) A. & E. 547; *Bignell v. Clarke* (1860) 5 H. & N. 485.

He cannot tie or bind a beast in the pound even to prevent its escape: Gilb. Distr. 65.

Any act of his which tends to the injury of the thing distrained is done at his peril. But if the animals die in the pound without any fault of the distrainer he may distrain again if the distress was for rent; or, if for damage feasant, he may bring an action of trespass for any damage done by the animals: *Vaspor v. Edwards* (1702) 1 Salk. 248; 1 Ld. Raym. 719.

The distrainer cannot work or use the thing taken, but he may milk cows when that is necessary: Bac. Abr. tit. Distress (D. 2); Cro. Jac. 148.

The poundkeeper is by law obliged to take and keep the cattle brought to him, and he incurs no liability in respect thereof, even if the taking be clearly illegal, unless he goes beyond his duty and in some way assents to the trespass: *Badkin v. Powell* (1776) Cowp. 476; *Black v. Stewart* (1886) 19 N. S. R. 77; *Branding v. Kent*, 1 T. R. 62.

The owner of an animal wrongfully impounded cannot recover against the purchaser at a sale by public auction by the poundkeeper under his lien for maintenance where the sale has been regularly and properly conducted: *Dodge v. Baker* (1892) 24 N. S. R. 552.

“*Receipting the Goods to the Tenant.*”

Where a distress is made and everything required by law to prosecute the distress warrant to completion is done, an arrangement postponing the sale and giving the intermediate care of the property to the tenant may lawfully be entered into: *Anderson v. Henry* (1898) 29



O. R. 719; 18 Occ. N. 378 [Div. Ct.], overruling *Langtry v. Clark* (1896) 27 O. R. 280; 16 Occ. N. 109 [Div. Ct.], and distinguishing *McIntyre v. Stata* (1854) 4 U. C. C. P. 248, noted at p. 516, *post*, which turned upon the form of the bond.

“This receipting the goods to the tenant, as it is sometimes called, is proper so long as it is not something independent of the distress but ancillary to it: it must be fair, reasonable and bona fide and not fraudulent or a contrivance to prejudice a subsequent claimant”: *Anderson v. Henry* (*supra*), per Boyd, C., at pp. 723 and 725.

In the case of an abandonment of a distress [see p. 422, *ante*] the rule is, of course, otherwise, and this is the question that usually arises, is the taking of the receipt an abandonment of the seizure? This is a question of fact, and the cases have already been discussed.

The provisions of the Statute 11 Geo. II. c. 19, s. 10, are wide enough to allow the goods to be secured by leaving them with the tenant as caretaker for the bailiff: per Boyd, C., in *Anderson v. Henry* (*supra*).

The rule does not apply where there has been no distress as in *Whimsell v. Giffard* (1883) 3 O. R. 1, noted at p. 513, nor where the distress has not been completed as in *Roe v. Roper* (1873) 23 U. C. C. P. 76, where the tenant was constituted agent of the landlord to take possession of the goods under the warrant and nothing further done after seizure.

Both of these cases were distinguished in *Anderson v. Henry* (*supra*).

### EFFECT OF IMPOUNDING.

ARTICLE 77.—When the goods distrained are impounded, they are considered to be in the custody of the law, but the property in the goods distrained whether they are impounded or not, remains vested in the tenant until they are sold under the distress.

Although goods distrained are in the custody of the law the possession and property are in the tenant till the

sale and meanwhile the landlord has only an inchoate right in them: *King v. England* (1864) 4 B. & S. 782; *Macdonald v. Cummings* (1892) 8 M. R. 406; *Anderson v. Henry* (1898) 29 O. R. 719; 18 Occ. N. 378 [Div. Ct.].

Pending the distress the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee: *Anderson v. Henry* (*supra*), distinguishing *McIntyre v. Stata*; *Whimsell v. Giffard*; *Roe v. Roper*, both noted at p. 513, *post*, also distinguishing *Langtry v. Clark*, discussed at p. 497.

The same principle would apply in cases of seizure under execution—goods distrained for rent cannot be seized under execution: *Theatre Amusement Co., Ltd. v. Squires* [1918] 3 W. W. R. 831 [Sask.—C. A.]; 14 Hals. 53. Conversely goods seized under execution cannot be distrained; this is dealt with in Article 83, p. 514, *post*.

Goods seized under distress for rent are so far regarded as in the custody of the law that a sheriff has no right to take them from the bailiff distraining, but the case of *Belcher v. Patten* (1848) 6 C. B. 608, shows that the sheriff may make a qualified seizure subject to the distress, which will be binding as against the execution debtor and those claiming under him: *Macdonald v. Cummings* (1892) 8 M. R. 406.

*City of Kingston v. Rogers* (1899) 31 O. R. 119 [Street, J.], laid it down that there is nothing in the Assessment Act to warrant a municipal tax collector seizing for arrears of taxes goods already distrained by a landlord and so *in custodia legis*. And another distress by the landlord for rent subsequently accruing due also had priority over the attempted distress for taxes.

### *Rescue Before Impounding.*

Rescue is where the owner, or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession, as when disturbed when making the distress, it is no rescue: Bull. N. P. 84.

Where a landlord has a right to distrain goods, and does distrain, they are lawfully in his possession, and he has a right to use as much force as is necessary to prevent the tenant from retaking them: *Dale v. O'Brien* (1886) 26 N. B. R. 123, per Allen, C.J.

If a distress be taken without cause, the party may lawfully make a rescue before it is impounded: Co. Lit. 47b; 161a; *Case of Avowry* (1609) 9 Co. R. 23b; *Keen v. Priest* (1859) 4 H. & N. 240; but if it is impounded, he cannot justify a breach of the pound to take it out; because the distress is then in the custody of the law: *Cotsworth v. Bettison* (1696) 1 Salk. 247; 1 Ld. Raym. 105; if, however, the pound be left unlocked, it seems he may take it. Whenever the distrainor abandons and quits possession of the distress, the retaking of it by the tenant or owner is not a rescue: *Dod v. Monger* (1704) 6 Mod. 216.

And if the distrainor make an unlawful use of the distress, the owner may take it out of his possession without being liable either for rescue or pound breach: *Smith v. Wright* (1861) 6 H & N. 821.

Though a seizure under a distress warrant does not change the property, yet where after the seizure the bailiff was proceeding to impound, when the tenant and an auctioneer sold the goods, the tenant handing them to the purchasers, the auctioneer knocking them down; it was held that the landlord could maintain an action for a rescue against the auctioneer: *Iredale v. Kendall* (1878) 40 L. T. 362.

The remedy of the landlord in case of rescue is under the Statutes noted at p. 496, *post*.

### *Pound Breach.*

“Pound breach is the retaking from the custody of the law of a chattel which has been impounded”: 11 Hals. s. 387 (part).

As the property remains in the tenant until sale (p. 493, *ante*) and the goods are not in the landlord's possession, he cannot maintain an action for trespass or

conversion; the only remedy he can have is an action for pound breach or rescue founded on the following statute: Bullen and Leake, 7th edn., p. 303; 11 Hals. 385.

### *The Statutes.*

By the 2 Wm. & M. Sess. 1, c. 5, s. 4, on any pound-breach or rescous of goods distrained for rent, the person [grieved thereby shall in a special action on the case recover treble damages and costs against the offender or against the owner of the goods, if they be afterwards found to come into his use or possession].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 65, s. 9.

New Brunswick: C. S. N. B. 1903 c. 153, s. 14.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 8 [damages only; not treble damages].

Ontario: R. S. O. 1914 c. 155, s. 51, has for the words in brackets [ ] the words "offending or the owner of goods distrained, in case the same are afterwards found to have come into his use or possession, shall forfeit to the person aggrieved \$20 in addition to the damage sustained by him."

Saskatchewan: 1919, 9 Geo. V. c. 79, s. 33, is a copy of the Ontario provision.

In an action on the 4th section of the 2 Wm. & M. Sess. 1, c. 5, the plaintiff is entitled to treble costs as well as damages: *McCallum v. Snider* (1860) 6 U. C. L. J. 187; 10 U. C. C. P. 191.

But the word "recover" in this Act means recover by the verdict of a jury, and where there is a reference to arbitration there cannot be a recovery of treble damages and costs under the Act: *Clark v. Irwin* (1862) 8 U. C. L. J. (O. S.) 21.

When goods fraudulently removed are rescued by the person on whose premises they are found, it is a question whether the statutes apply: *Harris v. Thirkell* (1852) 20 L. T. (O. S.) 98. But it is no defence to an action on these statutes that the rent and demand were tendered after the distress and impounding: *Firth v. Purvis* (1793) 5 T. R. 432.

Where goods were distrained and impounded and left on the premises in charge of the tenant for over three weeks under an agreement between the bailiff and tenant, a mortgagee of the goods who seized them when they were advertised for sale under the distress was held not to have committed a pound breach, the goods not being *in custodia legis*: *Langtry v. Clarke* (1896) 27 O. R. 280; 16 Occ. N. 109 [Div. Ct.], following *Whimsell v. Giffard* and *Roe v. Roper*, considered at p. 513, *post*. This case was not followed in *Anderson v. Henry*, discussed at p. 492, *ante*.

See also *Haszard v. Sterns* (1911) 9 E. L. R. 321 [P. E. I.—Fitzgerald, V.C.].

### *The Criminal Law.*

The Criminal Code provides [R. S. C. 1906 c. 146, s. 169 (b)] that every one who resists or wilfully obstructs . . . (b) any person . . . in making any lawful distress or seizure is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and on summary conviction before two justices, to six months' imprisonment with hard labour or to a fine of one hundred dollars.

It was held on a consideration of this section [then s. 144 (2)] that it devolves upon the prosecution to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent due and in arrear: *Rex v. Harron* (1904) 24 Occ. N. 10 (Co. Ct.—Kent); 40 C. L. J. 27.

In *Rex v. Shand* (1904) 7 O. L. R. 190 [C. A.]—a case of retaking possession under an hire-purchase agreement—Osler, J.A., considers the words “lawful distress or seizure.”

### THE RIGHT OF SALE.

ARTICLE 78.—The goods distrained for rent may—after the expiration of five clear days—be sold for the

best price that can be obtained for them, towards satisfaction of the rent and charges of the distress, appraisal and sale.

[Authorities: 2 W. & M. Sess. 1 c. 5, s. 2 (part), and the other statutes, noted under].

“*After the Expiration of Five Clear Days.*”

See Article 79.

### *The Right of Sale.*

The landlord is not obliged to sell: *Philpott v. Lehain, Anderson v. Henry*, noted at pp. 499, 501, *post*.

“The right to distrain was not given by statute, but existed at common law. But the common law distress was levied in order to compel or constrain the payment of rent in arrears, and the distrainor could do nothing with the goods but hold them. The right to sell the goods seized and apply the proceeds to the payment of the rent was first given by the Statute 2 W. & M. c. 5, s. 2. As the right to sell did not exist at common law, but was given by statute, it must be exercised, if at all, on the terms the statute imposes”: *Dewar v. Clements* (1910) 15 W. L. R. 341; 20 M. R. 212 (C. A.), per Cameron, J.A., p. 213, and see *Dick v. Winkler* (1899) 12 M. R. 624; 19 C. L. T. 33—[Killam, C.J.]. *Campbell v. Halverson* [1919] 3 W. W. R. 657 at 663; 12 Sask. L. R. 420 [C.A.]; *Macdonald v. Cummings* (1892) 8 M. R. 406 at 417.

The conditions imposed are set out in Articles 79 and 80.

In Alberta: By (1914) 4 Geo. II. c. 4, s. 4, no sale shall be made except upon the order of a judge of the Supreme or District Courts or a Master in Chambers, and there is no appeal from the order which may be made *ex parte*. The proceeds of the sale are not subject to the provisions of the Creditors Relief Act, s. 5.

This legislation is criticized in (1920) 40 C. L. T. 956.

### *No Sale at Common Law.*

The distress, being considered merely as a pledge, could not at the common law have been sold.

Under the statute the landlord may sell the goods distrained. It is permissive and not compulsory, and therefore no action lies for not selling, even in the case of an excessive distress: *Philpott v. Lehain* (1876) 35 L. T. 855; 33 L. J. Q. B. 309.

A landlord having distrained on property found on premises occupied by his tenant, is not bound to sell all the tenant's property before that of a third party found there: *Miller Bros. v. Twohey* (1907) 40 N. S. R. 424, noting *Gunning v. Sutherland*, *Ib.* 425 (note): *Williamson v. Andrews*, *Ib.* 426 (note).

### *The Statutory Provisions.*

By 2 Wm. & M. Sess. 1, c. 5, s. 2, where any goods shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house or other most notorious place on the premises, replevy the same; in such case, the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place where such distress shall be taken, cause the goods so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff or constable shall swear to appraise the same truly, according to the best of their understandings), and after such appraisement may sell the same for the best price that can be gotten for them, towards satisfaction of the rent and charges of the distress, appraisement and sale; leaving the over-plus (if any) in the hands of the said sheriff, under-sheriff or constable, for the owner's use.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 7 (substituted by c. 18 of 1915, s. 2) provides for the appraisers to be sworn before a Police or Stipendiary Magistrate,

a Justice of the Peace or a Commissioner for taking affidavits.

New Brunswick: C. S. N. B. 1903 c. 153, s. 9, gives the power when "the goods are seized by distress, Form A," and the notice is in Form B; the oath in Form C, the inventory in Form D, and the appraisement in Form E, as given in the Act.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 2 (1). By s. 2 (2) a replevin bond is provided for: by s. 2 (3) the appraisers may be sworn before a Justice of the Peace, the Sheriff or his deputy, a Constable or a Commissioner of the Supreme Court: see also s. 3, noted at p. 506, *post*.

Ontario: R. S. O. 1914 c. 155, s. 52, also requires a memorandum of the oath to be indorsed on the inventory and does not say by whom the oath shall be administered.

Saskatchewan: 1919, 9 Geo. V. c. 79, s. 34, corresponds with the Ontario Act.

### *Sale of Standing Crops.*

Standing corn and growing crops, seized as a distress for rent, cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe: *Owen v. Legh* (1820) 3 B. & Ald. 470; *Proudlove v. Twemlow* (1833) 1 Cr. & M. 326; 3 Tyr. 260.

Where standing crops are distrained for rent they may, in Ontario, Saskatchewan and New Brunswick, at the option of the landlord, be advertised and sold in the same manner as other goods; and it shall not be necessary for the landlord to reap, thresh, gather or otherwise market the same: R. S. O. 1914 c. 155, s. 44 (5); Saskatchewan 1919 c. 79, c. 24 (5); New Brunswick, C. S. N. B. 1903 c. 153, s. 17 (1).

### *Liability of Purchaser.*

The purchaser in such cases becomes liable for the rent of the land upon which the crops are standing at the time of the sale, and until they are removed, unless the rent has been paid or has been collected by the landlord or has been otherwise satisfied, and the rent shall, as



nearly as may be, be the same as that which the tenant whose goods were sold, was to pay, having regard to the quantity of land and to the time during which the purchaser occupies it: R. S. O. 1914 c. 155, s. 44 (6); Saskatchewan 1919 c. 19, s. 24 (6); New Brunswick: C. S. N. B. 1903 c. 153, s. 17 (2).

The statutes are merely permissive and not compulsory: *Anderson v. Henry* (1898) 29 O. R. 719; 18 Occ. N. 378 [Div. Ct.], per Boyd, C.

### *The Sale.*

The landlord may not buy at the sale of goods sold under his distress warrant: *Spain v. McKay* (1910) 7 E. L. R. 529; 30 C. L. T. 561, reversing 7 E. L. R. 503; 30 C. L. T. 560: *Moore, Nettlefold & Co. v. Singer Manufacturing Co.* (1904) 20 T. L. R. 366; 24 C. L. T. 151 [C. A.], affirming [1903] 2 K. B. 168; 19 T. L. R. 489; 23 C. L. T. 259 [Div. Ct.].

A landlord who proceeds to sell the goods of his tenant distrained upon for rent is bound to endeavour to secure the best price obtainable for them. Where it appeared from the evidence that the distress was excessive; that the goods, taken at cost price, were worth \$500; and they were disposed of for a sum much below their actual value, and that the landlord himself was a purchaser at the sale, and subsequently disposed of the goods so purchased at private sale, the Court declined to interfere with the judgment entered by the trial Judge in plaintiff's favour for \$300 damages: *Duchemin v. McKay* (1919) 52 N. S. R. 225 [Full Court].

A landlord may not purchase goods sold under his own distress warrant—even at an open auction sale. And where he did the tenant was given possession of the goods and \$1 nominal damages and costs: *King v. England* (*post*); *Moore v. Singer* (*supra*), followed; *Tingley v. Sharpe* (1906) 3 W. L. R. 159 [B. C.—Bole, Co.C.J.]. And see *Shore & Grant v. Wilson* (1916) 23 B. C. R. 33.

A bailiff's sale to an agent of the landlord was held to be a mere pretence in *Barlow v. Breeze* [1917] 1 W. W. R. 270 [B. C.—C. A.].

The taking of the goods by the landlord at the appraised price is not a sale transferring the property as against third persons: *King v. England* (1864) 4 B. & S. 782; 33 L. J. Q. B. 145; 10 Jur. N. S. 634; 9 L. T. N. S. 645; see also as to property not passing: *Iredale v. Kendall* (1878) 40 L. T. 362; *Att.-Gen. v. Leonard* (1888) 38 Ch. D. 622; 57 L. J. Ch. 860; 59 L. T. 624.

In Ontario it is settled that as between the landlord and the tenant the former may become the purchaser at a sale under his own distress warrant, but such a transaction is invalid as against execution creditors or mortgagees: *Williams v. Grey* (1873) 23 U. C. C. P. 561; *Shultz v. Reddick* (1881) 43 U. C. R. 155.

Certain goods were distrained for rent in arrear, and, after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenant's consent to the landlord, and one P. was put in charge, who, however, allowed the tenant to remain in possession as before. Subsequently the goods were seized and sold by the sheriff under executions against the tenant, whereupon the landlord brought trover, and it was held that he could not claim as purchaser at the bailiff's sale, and as there was no actual and continued change of possession, nor any registered bill of sale, his title as vendee from the tenant was invalid as against creditors under the Bills of Sale Act: *Burnham v. Waddell* (1878) 3 A. R. 288; 28 U. C. C. P. 263.

Where goods had been distrained at the instance of the defendants, an incorporated company, of which one H. was president, and at the sale H., who was also a member of an incorporated gas company, purchased the goods for the latter; it was held that H. was not both seller and buyer, and that the sale was not void on that ground: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476.

The sale will be valid where the landlord becomes the purchaser by the consent of the tenant, and there is such a change of possession or registration as will satisfy the Bills of Sale Act: *Woods v. Rankin* (1868) 18 U. C. C. P. 44.

Where the landlord purchases the goods of a third person at the sale, and, as against the owner, acquires

no title by such purchase, he cannot set up a lien for the rent, for the article so acquired is not in his hands as a pledge or in the custody of the law: *Williams v. Grey* (*supra*).

The goods must be sold for the best price that can be obtained, and the landlord cannot impose on the sale any conditions which must necessarily prevent the goods from being sold at the best price: *Hawkins v. Walrond* (1876) 1 C. P. D. 280. Thus if a tenant be under a covenant not to carry hay and straw off the premises, the landlord is not entitled to sell hay and straw that he has taken as a distress subject to a condition that the purchaser shall consume it on the premises: *Ridgway v. Stafford* (1851) 6 Exch. 404; see also *Roden v. Eyton* (1848) 6 C. B. 427; for such a condition would necessarily affect the price.

A distress sold at the appraised value is intended to have been sold at the best price, since the law relies on the appraisers having been sworn: *Walter v. Rumball* (1696) 1 Ld. Raym. 53.

But in an action for not selling goods at the best price, evidence may be given that the goods were allowed to stand in the rain and were improperly lotted: *Poynter v. Buckley* (1833) 5 C. & P. 512.

### *Disposition of the Proceeds.*

The whole produce of the sale may, if necessary, be applied in satisfaction of the rent and expenses, but if the produce be more than sufficient for that purpose, the statute 2 Wm. & M. Sess. 1, c. 5, s. 2 [p. 499, *ante*, and see R. S. N. S. 1900 c. 172, s. 3 (p. 500)] requires that the residue "or overplus" be left in the hands of the sheriff, under-sheriff or constable for the use of the owner of the goods distrained: *Pettit v. Kerr* (1888) 5 M. R. 362; *Robinson v. Shields* (1866) 15 U. C. C. P. 386.

The "overplus" means what remains after payment of the rent and the reasonable charges of the distress: *Lyon v. Tankies* (1836) 1 M. & W. 603; *Knight v. Egerton* (1852) 7 Exch. 407; and if it be not left for the

owner's use he has an action for the actual damages sustained: *Lyon v. Tankies* (*supra*); but not an action for money had and received to recover the amount of the overplus: *Yates v. Eastwood* (1851) 6 Exch. 805.

So the landlord must return any goods unsold, after the rent and expenses are paid, to the premises from which they were taken, or perhaps put them in some convenient place and notify the owner: *Pettit v. Kerr* (*supra*) per Killam, J.; *Evans v. Wright* (1857) 2 H. & N. 527.

As a bailiff is bound to return to the tenant any overplus after sale under distress, the receipt thereof by the latter is no condonation of any tortious act when the money is not paid or received in compromise of such act: *Robinson v. Shields* (*supra*).

The charges for the distress may be questioned in an action for not returning the overplus, but it is not clear whether the amount deducted for rent can be also questioned: *Lyon v. Tankies* (*supra*). It is a question for the jury whether the overplus when returned is accepted in full satisfaction, and if otherwise what the real balance is: *Id.*

### NOTICE OF SALE.

ARTICLE 79.—Before the sale can be made notice of the distress must be left at the dwelling house or other most conspicuous place on the premises charged with the rent distrained for and five clear days must elapse.

[Authorities: The Statutes noted at p. 499, under Article 78].

An appraisement must also be made: Article 80.

#### *Notice of the Distress.*

After the inventory is taken it is necessary to give a notice in writing (*Wilson v. Nightingale* (1846) 8 Q. B. 1034) to the tenant of the fact of the distress having been made, and the time when the rent and charges must be paid or the goods replevied. This is usually done by writing such notice at the bottom of the inventory.

A notice of distress stated that the landlord had distrained the several goods, chattels and effects specified in the schedule; which, after enumerating certain goods, concluded thus: "and all other goods, chattels and effects on the said premises, that may be required in order to satisfy the above rent, together with all necessary expenses;" and it was held that the notice was too vague and uncertain to justify the sale of goods of a stranger which he had deposited on the premises: *Kerby v. Harding* (1851) 6 Exch. 234.

After a distress was made the tenant, on being informed that he had eight days in which to redeem, said he did not require an inventory of the goods to be given to him, and it was held that this did not constitute a waiver of the notice of distress: *Shultz v. Reddick* (1882) 43 U. C. R. 155.

A true copy of the inventory and notice, and copy of the demand and costs, should be personally served on the tenant or left at the house, or if no house, then they should be posted in some notorious place on the premises. The 11 Geo. II. c. 19, s. 8 [p. 456], requires that the place to which the goods are removed should be mentioned in the notice. The notice of distress is only required to enable the landlord to sell, consequently the distress itself will be valid and legal though no notice be given: *Trent v. Hunt* (1853) 9 Exch. 14.

It is only irregular to sell without due notice: *Lucas v. Tarleton* (1858) 3 H. & N. 116; *Wilson v. Nightingale* (*ante*); *Robinson v. Waddington* (1849) 13 Q. B. 753. But the absence of notice and of a legal appraisalment before sale will render the distress illegal where the actual value of the goods sold is much greater than the rent: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476.

### *Requisites of the Notice.*

The notice need not set out at what time the rent became due nor the correct amount of the arrears really due: *Moss v. Gallimore* (1779) 1 Doug. 279; 1 Sm. L. C. (12th Edn.) 580.

In all cases personal notice is sufficient and indeed preferable to notice left at the mansion-house or other notorious place, on account of the difficulty of proof: *Walter v. Rumball* (1696) 1 Ld. Raym. 53; 1 Salk. 247. Notice to the owner of goods, not being the tenant, is sufficient as against him unless replevin has been commenced by the tenant: *Id.*

The statute requires the notice to specify the cause of taking.

The form is prescribed by C. S. N. B. 1903 c. 153, s. 9.

### *The Notice of Sale.*

In Nova Scotia there must be five days' notice of the sale: R. S. N. S. 1900 c. 172, s. 3, which provides that after the appraisement of such goods the landlord shall, after giving five days' notice of sale by handbills, posted in at least five conspicuous places in the locality, sell the goods for the best price, apply the proceeds to rent and expenses and pay any surplus to the owner.

Where a colonial legislature shows unmistakably that in framing an enactment it had before its mind and as its model a particular Imperial Act, from which it selects for enactment certain clauses, while there are others in the same statute not enacted, these last referred to cannot have the force of law in the colony. Under the special provisions of the statute law of Nova Scotia, differing from that of England, where the distrainor did not give five days' notice of sale of the goods, he was held to be a trespasser *ab initio*: *Cornelius v. Burton* (1872) 9 N. S. R. 337.

### *Five Clear Days Must Elnapse.*

Under the statute goods distrained cannot be sold until the expiration of five days after a written notice of distress, with the cause of the taking, shall have been given. These five days must be calculated exclusively of the day of taking: *Robinson v. Waddington* (1849) 13 Q. B. 753. And where the only notice was one given on the 8th February, and the sale took place on the 12th, it was held invalid: *Shultz v. Reddick* (1881) 43 U. C. R. 155.

What the statute requires is five clear days between the day of the distress and the sale. Thus a distress on the 25th October could not be sold until the 31st of the month; the day of seizure and the day of sale being both excluded. After the expiration of this period the landlord is at liberty to proceed and sell, but he is not obliged to do so. He has a reasonable time in which to dispose of the distress, and what is such time depends on the circumstances of each case: *Lynch v. Bickle* (1867) 17 U. C. C. P. 549; *Pitt v. Shew* (1821) 4 B. & Ald. 206, 208; *Sharp v. Fowle* (1884) 12 Q. B. D. 385; *Philpott v. Lehain* (1876) 35 L. T. 855; 33 L. J. Q. B. 309.

A distress taken on Monday or Tuesday cannot lawfully be sold until the following Monday, for if on Monday, the following Sunday, being the first day, is a *dies non*: *Lucas v. Tarleton* (1858) 3 H. & N. 116, and see the various Interpretation Acts.

### *How Soon the Sale Must be Made.*

The landlord has a reasonable time after the expiration of the five days in which to sell the distress and what is a reasonable time is a question of fact depending on the circumstances of each case: *Lynch v. Bickle* (1867) 17 U. C. C. P. 549; *Pitt v. Shew* (1821) 4 B. & Ald. 208, both followed in *Anderson v. Henry* (1898) 29 O. R. 719; 18 Occ. N. 378 [Div. Ct.]; *Langtry v. Clark* (1896) 27 O. R. 280.

If there is no collusion between the landlord and tenant and no fraud, delay in selling does not prejudice the distress and a third party interested in the goods, *e.g.*, a chattel-mortgagee, is not entitled to take advantage of the delay: *Anderson v. Henry* (*supra*).

Indeed, so far as growing crops are concerned it has already appeared [p. 500, *ante*] that, apart from statutes which are merely permissive, a sale cannot lawfully be made until the crops are harvested.

A bona fide arrangement to get time to sell with a view of realizing the best prices on cattle and crops is not evidence of collusion between a landlord and his tenant.

Where there has been an abandonment of the distress, as has already been seen (p. 493, *ante*), a sale cannot be made.

“Perhaps this matter of delay in selling does not vitiate the proceedings because of the old law that the landlord is not obliged to sell at all, but may elect to hold the distress till he is paid: *Lehain v. Philpott* (1875) L. R. 10 Ex. 242”: per Boyd, C., in *Anderson v. Henry* (1898) 29 O. R. 719.

### APPRAISEMENT.

ARTICLE 80.—After the expiration of the five [A] days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers [B] who shall first be sworn to appraise the same truly, according to the best of their understanding [a memorandum of which oath is to be endorsed on the inventory].

[Authorities: The statutes noted under Article 78, p. 497, *ante*].

Appraisement is no longer necessary in England, 11 Hals. 170.

“The right to sell given by the statute must be exercised upon the terms it imposes,” Cameron, J.A., in *Dewar v. Clements* (1910) 20 M. R. 212, at 213; [C. A.] 15 W. L. R. 341; *Macdonald v. Cummings* (1892) 8 M. R. 406 at 417.

See also *McDermott v. Fraser* (1915) 25 M. R. 298, at 304, 305 (Curran, J.); 8 W. W. R. 196; 23 D. L. R. 430.

“It appears the oath required by the statute can be administered by the officer conducting the proceedings,” per Cameron, J.A., in *Dewar v. Clements* (*supra*), referring to *Maguire v. Post* (1837) 5 U. C. Q. B. (O. S.) 1; *Stoddart v. Arderly* (1838) 6 U. C. Q. B. (O. S.) 305, and *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476, and it was held that the insertion in Sched. A. of the Costs of Distress Act [p. 486] of the words “whether by one appraiser or more,” could not be held to repeal the



2 Wm. & M. Sess. 1, c. 5, s. 1, which requires the appraisal by two sworn appraisers before sale, whatever may be the amount of rent due or the value of the goods: *Stoddart v. Arderly* (*ante*); *Bishop v. Bryant* (1834) 6 C. & P. 484; *Allen v. Flicker* (1839) 10 A. & E. 640.

The form of appraisement is prescribed by C. S. N. B. 1903 c. 153, s. 9.

The appraisers must be reasonably competent, but need not be professionals: *Roden v. Eyton* (1848) 6 C. B. 427; *Clarke v. Holford* (1848) 2 C. & K. 540; *Child v. Chamberlain* (1834) 6 C. & P. 213; but "the party distraining" cannot be one: *Westwood v. Cowne* (1816) 1 Stark. 172; even where he is a bailiff and calls in another to assist him in the valuation.

In such case the sale will be irregular: *Lyon v. Weldon* (1824) 2 Bing. 334; and the landlord will be liable for the value of the things sold over and above the rent due: *Howell v. Listowel Rink Co.* (1887) 13 O. R. 476.

But if the tenant to save expense request that appraisers be not called in, and thereupon the bailiff value the goods, the irregularity will be waived: *Bishop v. Bryant* (*supra*).

Where, in addition to the sale without an appraisement, there is a tender of the rent due, the plaintiff may recover not merely the difference between the rent and the value of the goods, but the whole damages sustained by him in consequence of his being wrongfully deprived of his goods: *Howell v. Listowel Rink Co.* (*supra*).

In case for illegal distress the plaintiff is entitled to succeed on showing that there was no such appraisement as the law directs, even though but for nominal damages: *Maguire v. Post* (*ante*).

#### *A Memorandum of the Oath Endorsed on the Inventory.*

This provision does not appear in the 2 Wm. & M. Sess. 1 c. 5, s. 1. It is required in Ontario and Saskatchewan. See p. 500, *ante*.

Appraisement of grain and growing crops is provided for in the statutes noted at p. 499, *ante*. By 11 Geo. II., c. 19, s. 8; R. S. B. C. 1911 c. 65, s. 16, and in Nova Scotia by R. S. N. S. 1900 c. 172, s. 5 (3) when growing crops are distrained the appraisement is to be made after the crop is cut, cured and gathered and not before.

### IRREGULARITIES CURED.

ARTICLE 81.—“Where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall afterwards be done by the person distraining or by his agent [*or if there has been an omission to make an appraisement under oath,*] the distress itself shall not be therefore deemed to be unlawful, nor the person making it be deemed a trespasser *ab initio*; but the person aggrieved by such unlawful act or irregularity may recover by action full satisfaction for the special damage sustained thereby.”

[R. S. O. 1914 c. 155, s. 53, from which the above is taken, is copied from 11 Geo. II. c. 19, s. 19 (Imp.), which had not the words in brackets [ ] ].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 65, s. 19, is copied from the Imperial Act.

New Brunswick: C. S. N. B. 1903 c. 153, s. 16.

Nova Scotia: R. S. N. S. 1900 c. 172, s. 10.

Saskatchewan: Stats. 1919 c. 79, s. 35, is copied from the Ontario Act. By s. 37 of the Saskatchewan Act it is also provided that in any action, suit or matter in which the legality of a distress is called in question, the proceedings in connection with such distress shall be taken to have been valid and regular until the contrary is shown.

*Tender of Amends.*

11 Geo. II. c. 19, s. 20, provided that there should be no recovery in any action for any irregularity if tender of sufficient amends is made by the party distraining or his agent before such action is brought.

This provision appeared in the Ontario Landlord and Tenant Act, R. S. O. 1897 Vol. III. c. 342, s. 17. It was dropped in 1911 when the Act was consolidated by 1 Geo. V. c. 37 [see s. 53]. But the Judicature Act, R. S. O. 1914 c. 56, s. 71, now covers the case.

The 11 Geo. II c. 19, s. 20 is re-enacted in British Columbia: R. S. B. C. 1911 c. 65, s. 20; Nova Scotia R. S. N. S. 1900 c. 172, s. 10.

In *McDonald v. Fraser* (1904) 14 M. R. 582 (Ct. en B.) 24 Occ. N. 101, it was held that the want of a sworn appraisement required by 2 W. & M. is only an "irregularity" within the meaning of the Stat. 11 Geo. II. c. 19, s. 19, and the tenant could only recover such special damage as he could prove: *Lucas v. Tarleton* (1858) 3 H. & N. 116, and *Rodgers v. Parker* (1856) 18 C. B. 112, followed.

Following this reasoning the insertion of the words in brackets in the Ontario Statute would appear to have been *ex majore cautela*.

In *Dewar v. Clements* (1910) 20 M. R. 212 [C. A.], the Court, apparently, did not consider the effect of the Statute 11 Geo. II., and held that the sale of the distress was illegal under 2 W. & M. c. 5, s. 2, if there had been no sworn appraisement, and that *when damage* has occurred the tenant was entitled to recover the real value of the goods: *i.e.*, their value to him, less the rent and expenses, following *Rocke v. Hills* (1887) 3 T. L. R. 298, and *Knight v. Egerton* (1851) 7 Ex. 407.

In *Pegg v. I.O.F.* (1901) 1 O. L. R. 97 (Div. Ct.), Boyd, C., said that the proper measure of damages for the irregularity of selling without appraisement or valuation was "the real value of what was sold minus the rent due; this is laid down in *Biggins v. Goode* (1832) 2 Cr. and J. 364, followed in *Howell v. Listowel Rink & Park Co.*

(1886) 13 O. R. 492, and in *Knight v. Egerton* (1852) 7 Ex. 407."

*Independent Lumber Co. v. David* (1911) 1 W. W. R. 134; 19 W. L. R. 387 [Ct. en B.], held that failure to appraise was only an irregularity after seizure which might be waived by the tenant, although if it were shown that the landlord sold the goods seized for less than their value he might be liable in an action by a person prejudiced thereby.

*Beckham v. Hickey* (1906) 38 N. S.R. 55 [Full Court], the defendant distrained for rent overdue but nothing further was done and no special damage was shown: Held that, if there were irregularities in connection with the making of the distress, the defendant was protected by R. S. N. S. 1900 c. 172, s. 10. A previous distress of the plaintiff's goods was irregular in a number of particulars, among others as including goods which were not distrainable, and omission to give the notice required by the Statute s. 2, but none of the articles were removed from the premises; the plaintiff continued to use them as before, and the distress was abandoned before anything had been sold: Held, that, to entitle the plaintiff to damages on account of the irregularities committed, some substantial hurt or injury must be shown resulting from the irregular proceeding, and that, in the absence of proof of actual damage the trial Judge erred in awarding damages to the plaintiff.

Where no notice was given and no appraisalment was made the tenant who could show no special damages was held to be without redress: *Blanshard v. Bishop* (1911) 19 O. W. R. 28; 2 O. W. N. 996—[Latchford, J.].

Although as between landlord and tenant the latter may waive irregularities in a distress of goods for rent in arrear he cannot do so as to third persons, and what might be a seizure as against the tenant will not be so against a mortgagee. There was a mortgage on certain goods of a tenant, and the landlord on the 17th of February, 1883, went to the house and declared that he seized everything for rent, but touched nothing and made

no inventory. On the 24th of February he went again and told the tenant's wife that the property had been seized for rent and to let no one take anything away, when she promised to do her best for him. On the 5th of March, the mortgagee, hearing that the goods were going to be seized for rent, took possession and removed the goods. A bailiff went the next day for taxes in arrear and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and, on the tenant waiving an inventory, advertising, etc., sold them within two days to a nephew of the landlord. It was held that the landlord's two visits of 17th and 24th of February did not amount to a distress and the mortgagee was entitled to damages for the seizure and conversion of the goods: *Whimsell v. Giffard* (1883) 3 O. R. 1; *Roe v. Roper* (1873) 23 U. C. C. P. 76, which were followed in *Langtry v. Clarke* [p. 497, *ante*], and distinguished in *Anderson v. Henry* [p. 424, *ante*].

The holder of a bill of sale on the tenant's goods went to his house in order to remove them. The landlord met him there and said the rent was in arrear and until it was paid the goods should not be removed, and measures were taken to use force if necessary to prevent the removal. It was then after sunset, and the lessor intended to prevent removal until he could legally distrain. This was held no conversion as the bargainee should not have acquiesced. *England v. Cowley* (1873) L. R. 8 Ex. 126; 42 L. J. Ex. 80; 28 L. T. 67.

### REMOVAL BY PURCHASER.

ARTICLE 82.—The purchaser of property sold for rent must remove the same from off the premises within a reasonable time after the sale.

If the property be sold on the 15th of February and the purchaser enters to remove on the 26th of March following, he will be liable as a trespasser: *Alway v. Anderson* (1848) 5 U. C. R. 34. The 11 Geo. II. c. 19, s.

10, and other statutes noted at p. 490 (*ante*), give the privilege to the purchaser to go to and from the premises in order to remove the goods, but the right must be exercised within a reasonable time: *Pitt v. Shew* (1821) 4 B. & Ald. 208.

Where goods which are on the tenant's lands are sold under a distress, with a condition, to which the tenant is a party, that they may remain on the land up to a certain day, and that the buyer may remain and take the goods, the tenant cannot revoke the license to enter on the land: *Wood v. Manley* (1839) 11 A. & E. 34; *Wood v. Leadbitter* (1845) 34 M. & W. 838. But such a license is not implied by law, though the goods may have remained on the land with the tenant's consent: *Williams v. Morris* (1841) 8 M. & W. 488.

#### RENT AS AGAINST EXECUTION CREDITORS.

ARTICLE 83.—Goods in the custody of the law cannot be distrained, but by Statute a landlord is entitled to receive from an execution creditor of the tenant who has made a seizure one year's arrears of rent before the goods are removed from the premises.

[Authorities: 8 Anne c. 14 [18], s. 1, and the other Statutes noted thereunder].

Goods in the custody of the law, such as property, already taken damage feasant or in execution, cannot be distrained for rent: Co. Lit. 47 (*a*); *Hart v. Reynolds* (*post*).

Therefore cattle or goods already taken damage feasant or by the sheriff under an execution, attachment or extent, cannot be distrained for rent whilst in such custody: *Peacock v. Purvis* (1820) 2 Brod. & B. 362; *Wright v. Dewes* (1834) 1 A. & E. 641; *Wharton v. Naylor* (1848) 12 Q. B. 673; *Hughes v. Towers* (*post*); *McIntyre v. Stata* (*post*).

Where the sheriff seizes and sells growing crops under an execution they are *in custodia legis* when in the

hands of the sheriff's vendee pending their ripening and removal, and the landlord cannot distrain, though his rent was due before, to the knowledge of the sheriff and the execution creditor. But he has his remedy under the 8 Anne, c. 14, s. 1, for one year's rent in such case: *Wharton v. Naylor* (*supra*).

But the execution may be abandoned, in which case the distress is valid.

In *Cross v. Davidson* (1897) 17 Occ. N. 189 [Meredith, C.J.], affirmed (1898) 18 Occ. N. 231, a Division Court bailiff had placed a man in charge of goods seized under an execution; this man left voluntarily, of his own motion, with no intention of returning. This he did without the bailiff's knowledge or sanction and in violation of his duty. It was held there was an abandonment of the seizure; the goods were not *in custodia legis* and a distress made after the man left was good.

And the landlord may distrain after the sheriff sells the goods if they are not removed from the premises within a reasonable time: *MacLean v. Anthony* (1884) 6 O. R. 330.

The purchaser from the sheriff must, therefore, remove the goods within a reasonable time after the sale in order to protect himself against a distress for rent. There was a seizure on 20th October, and the sheriff sold on the 6th December following; but, in consequence of an attachment from the Insolvent Court, a claim for taxes and another for rent, the sheriff was not in a position to give the purchaser possession until 27th December, when he notified him that he might remove his goods; but the latter did not commence to do so before the 5th January, on which day the landlord put in a distress for rent, which had accrued on the 1st December previously. It was held that the goods had not been removed within a reasonable time either after the sale or after the notice to remove them, and in either view they were liable to the distress, for they had ceased to be in the custody of the law for any purpose of the execution: *Hughes v. Towers* (1866) 16 U. C. C. P. 287; see also *In re Benn-*

*Davis* (1885) 55 L. J. Q. B. 217; 54 L. T. 304; *Grant v. Grant* (1885) 10 P. R. 40.

A sheriff seized goods on an execution; but, on receiving an undertaking from the debtor, and a surety for him to produce the goods when required, relinquished the actual possession of the goods and left them with the debtor. It was held that after this the goods were not *in custodia legis* and the landlord might distrain for rent: *McIntyre v. Stata* (1854) 4 U. C. C. P. 248.

Where a sheriff's officer after seizing under a *fi. fa.* goods, merely makes an inventory thereof, but leaves no one in possession, they are not *in custodia legis* or exempt from distress: *Hart v. Reynolds* (1864) 13 U. C. C. P. 501.

As has already [p. 398 *ante*] appeared, goods in the possession of an assignee for the benefit of creditors are not *in custodia legis* so as to protect them from distress,

If the sale of goods under an execution be fraudulent, as where a fictitious bill of sale is made and the goods remain on the premises, they may be distrained for rent: *Smith v. Russell* (1811) 3 Taunt. 400.

And where the execution was irregular, as where a sheriff's officer executed a writ of *fieri facias* by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key and went away, without leaving any person in possession—and after the writ was returnable the landlord distrained; it was held that it was a lawful distress: *Blades v. Arundale* (1813) 1 M. & S. 711.

### *The Statute of Anne.*

"No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by



virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or *shall be due for rent* for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this Act, and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 126, s. 2.

New Brunswick: C. S. N. B. 1903 c. 153, ss. 20, 21 [saving the King's Rights], and see s. 22.

Nova Scotia: R. S. N. S. 1900 c. 172, ss. 18 (1), 18 (2).

Ontario: R. S. O. 1914 c. 155, ss. 55 (1), 55 (2), 55 (3).

This Act became necessary because goods in the custody of the law cannot be distrained.

The Act does not apply where the seizure is complete and the goods are removed from the premises before the rent falls due: *Street v. Glass* (1840) 3 N. B. R. 165; *Douglas v. Carrington*, noted at p. 520, *post*.

### *"No Goods or Chattels."*

The Act applies to all goods and chattels upon the demised premises whether belonging to the tenant or not: *Forster v. Cookson* (1841) 1 Q. B. 419.

### *Lying upon the Premises.*

The sheriff who seizes and sells goods as those of the execution debtor, who is also a tenant owing rent, is not liable to the landlord for so doing under the statute if

the goods are removed from the premises before distress, and the goods are not in fact the goods of the debtor or tenant, but of a third party. The statute only applies to the goods of the execution debtor, and not to those of third persons, against whom there must be a distress, and a notice from the landlord to the sheriff is not sufficient: *Clarke v. Farrell* (1880) 31 U. C. C. P. 584.

The statute only applies to the goods of the execution debtor and not to those of third persons, against whom there must be a distress, notice to the sheriff not being sufficient: Rouleau, J., citing *Clarke v. Farrell* (*supra*); *Robinson v. McIntosh* (1899) 4 Terr. L. R. 102 at 104.

When goods are sold under an interpleader order by the sheriff, and the proceeds are paid into Court, as in this case, the whole proceeds should be paid in, less only the expenses of possession and sale, and the landlord will only be entitled to his rent, if the execution creditor succeeds in the issue, but if the sheriff succeeds, the latter will be entitled to the whole fund freed from the landlord's claim: *Robinson v. McIntosh* (*supra*).

*There Must be a Bona Fide Tenancy with a Right of Distress.*

The statute only applies to existing tenancies at a fixed rent, for which a distress may be made. Therefore the sheriff is not liable for removing goods, etc., where the tenancy has determined before the seizure though within six months of it: *Cox v. Leigh* (*post*).

Neither does the statute apply where the occupation is under a license and not a lease: *Seymour v. Lynch* [p. 18, *ante*], nor in the case of a mere agreement for a lease under which no rent has been paid: *Riseley v. Ryle* (1843) 11 M. & W. 16; and of which the Court would not decree specific performance. But if the agreement be one of which the Court would decree specific performance, the statute would apply in those provinces under the Judicature Act [see p. 105, *ante*].

It may be laid down as a general rule that the landlord is only entitled to the benefit of the statute where

he cannot distrain by reason of the goods being in the custody of the law: *Re Benn Davis* (1885) 55 L. J. Q. B. 217; 54 L. T. 304.

But it is clear that he must have otherwise the right to distrain. Thus where a mortgage created the relation of landlord and tenant between the mortgagor and mortgagee and purported to give a power of distress in respect of arrears of interest, which is not a fixed rent, it was held that the mortgagee not having the right to distrain for the arrears was not entitled to the benefit of the statute: *Trust and Loan Co. v. Lawrason* [p. 227, *ante*]. It is also clear that the relation of landlord and tenant must exist between the execution debtor and the person claiming the benefit of the Act: *Hobbs v. Ontario Loan and Debenture Co.* [p. 227, *ante*].

A tenant being indebted to a bank gave S., the general manager, a second mortgage upon his land. Later he leased the land from S. for nine months, and a year later, in consideration of an advance to pay the arrears due on the first mortgage, executed another lease by which he agreed to pay two-thirds of the crop as rent and also agreed to other stringent provisions. It was held that the lease was not a real lease, the rent was excessive and not a *bona fide* rent; that no real tenancy was created and the statute did not apply: *Stikeman v. Fummerton* (1911) 21 M. R. 754 [Man.—Macdonald, J.].

*The Act only Applies where the Term Continues.*

The Act does not apply when the term is at an end, whether put an end to by a notice to quit or by entry or ejectment for a forfeiture: *Cox v. Leigh* (1874) L. R. 9 Q. B. 333; *Griffith v. Brown* (1871) 21 U. C. C. P. 12; *Hodgson v. Gascoigne* (1821) 5 B. & Ald. 88; *Baker v. Atkinson* (1886) 11 O. R. 735; 14 A. R. 409. It applies, however, to the case of a lessee and under-tenant of apartments: *Thurgood v. Richardson* (1831) 7 Bing. 428; but not as between the ground landlord and his tenant's lessee: *Bennett's Case* (1727) 2 Stra. 787.

*By Virtue of any Execution.*

“The statute was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with the creditors to issue writs of execution; for property so in the custody of the law could not be distrained, and the judgment creditor by keeping possession for a length of time, might seriously affect the interests of the landlord. The statute, therefore, contemplated executions issued by third persons and not by the landlord”: per Tindale, C.J., in *Taylor v. Lanyon* (1820) 6 Bing. 224, at 247, followed by Elwood, J., in *Douglas v. Carrington* (1914) 7 W. W. R. 59, at p. 61; 29 W. L. R. 90; 7 Sask. L. R. 80; 20 D. L. R. 919.

But it should be construed liberally. It is not, therefore, confined to plaintiffs. A defendant who has sued out execution for his costs of defence must settle with the landlord under the Act: *Henchett v. Kimpson* (1762) 2 Wils. 141.

*Sums Due for Rent.*

The fact that the rent is payable in advance does not prevent the Act from applying: *Harrison v. Barry* (1819) 7 Price, 690; even when reserved in a mortgage by way of further security for the interest: *Yates v. Ratledge* (1860) 5 H. & N. 249.

*Crop Rents.*

“The purpose of the statute being for the more easy and effectual recovery of rents, and as it is to be construed in favour of landlords (*Henchett v. Kimpson ante*), and, as there are no authorities holding that it applies only to rents payable in money, I am of the opinion that the object of the statute was to protect the landlord no matter how the rent was payable, as long as it was capable of being reduced to a specific sum of money, as it can be in this case” (the case of a crop rent lease—the rent being one-third of the crop delivered on the day of threshing)—Newlands, J.: *Foster v. Moss* (1911) 17 W. L. R. 174 [Ct. en B.].

The landlord can only claim the rent due at the time of the seizure of the goods and not that which accrues after the taking, though during the possession by the sheriff: *Hoskins v. Knight* (1813) 1 M. & S. 245; *Reynolds v. Barford* (1844) 7 M. & G. 449; *In re Benn Davis* (*ante*).

*“As Are or Shall be Due . . . at the Time of Taking.”*

To give the landlord the benefit of the statute rent must be due at the time of the seizure—it is not sufficient that rent become due after seizure: per Brown, J., in *Sawyer-Massey Co. v. White* (1914) 7 W. W. R. 671 [Sask.], following *Hoskins v. Knight*; and *In re Benn Davis* (*ante*).

When the sheriff seizes goods under an execution and takes a bond to secure the return, it is no defence in an action on the bond for the obligors to allege a seizure under distress for rent without averring that the rent was due when the sheriff seized under the execution: *Rapelje v. Finch* (1856) 14 U. C. R. 249, 468.

But the landlord will be entitled to the benefit of the Act if by virtue of a special stipulation in the lease the rent is to become due on the tenant leaving prior to the ordinary gale day: *Vance v. Ruttan* (1854) 12 U. C. R. 63.

Where the rent is not due, the landlord is not entitled, by virtue of the New Brunswick Act, to be paid rent from the proceeds of the sale under an execution; and it is doubtful if this section applies to cases of goods taken under a writ of attachment: *Ex parte Fish* (1877) 17 N. B. R. 273.

The Nova Scotia Act does not apply to goods taken on an attachment under the Absconding Debtors' Act: *Miller v. Ling* (1883) 16 N. S. R. 135.

Before an order can be made on a sheriff to pay rent out of the proceeds of goods sold under execution it must be shown that the rent is actually due; and when the rent is payable whenever demanded, it should be shown when the rent was demanded and from whom: *R. v. Williston* (1878) 18 N. B. R. 149.

The sheriff is not liable unless he has knowledge that the rent is due: *Kingston v. Shaw* (1861) 20 U. C. R. 223; 6 U. C. L. J. 280 [Co. Ct. Frontenac].

But the sheriff is justified in relying on the landlord's statement as to whether the rent is due or not. A landlord gave a written notice to a sheriff who had seized goods that there was then due him "one half year's rent," not stating when it fell due or for what period it was claimed. The landlord afterwards went to the sheriff, and, being asked when his rent fell due, said it would be on the following Monday. The rent was in fact payable quarterly, and one quarter was due at the time of the seizure, but it was held that the sheriff was justified in disregarding the landlord's claim on account of his own statement: *Tomlinson v. Jarvis* (1853) 11 U. C. R. 60.

In *Sawyer-Massey Company v. White* (1914) 7 W. R. 671; 30 W. L. R. 873; 21 D. L. R. 454 [Brown, J.] (1915) 8 W. W. R. 493 [Ct. en B.], the following provision in a lease was considered—"And also that if the term hereby granted or the lessee's goods and chattels on said lands liable to distress shall be at any time seized or taken in execution or attachment by any creditor of the said lessee . . . then the current year's rent shall immediately become due and payable and the said term shall immediately become forfeited and void."

It was held that by virtue of this clause seizure is necessary to the falling due of the rent. Until seizure the rent is not due. Upon seizure it immediately becomes due and seizure, therefore, must precede the falling due of the rent as cause precedes effect.

The Statute of Anne was passed for the protection of the landlord where the sheriff seized under execution at the time when the landlord's rent was due and he could have distrained therefor.

If the meaning of the statute is that the rent must be in arrear at the time of seizure the acceleration clause in the lease could not have had the effect of making the rent in arrear at the time of the seizure.

*The Rent Must be in Arrear at the Time of Taking.*

*Sawyer-Massey Co. v. White* (1915) 8 W. W. R. 493 [Sask. — Ct. en B.], following *Wharton v. Naylor* (1848) 12 Q. B. 673; 17 L. J. Q. B. 278, and applying *Thomas v. Morehouse* (1887) 19 Q. B. D. 563; 56 L. J. Q. B. 653; and *In re MacKenzie* (1889) 2 Q. B. D. 566; 68 L. J. Q. B. 1003.

*Notice to the Sheriff.*

The Act does not prescribe any particular form of notice to be given by the landlord to a sheriff who has seized the tenant's goods. It is enough that in fact the sheriff or his bailiff had notice that rent was due. A direct notice does not seem absolutely indispensable. Where the landlord distrains for rent while the sheriff's officer is in possession, such action, though illegal, will amount to notice of the landlord's claim, if notice of the distress be given to the sheriff: *Sharp v. Fortune* (1859) 9 U. C. C. P. 523.

A verbal notice from the landlord to the sheriff will be sufficient, and if it can be shown that the sheriff knew of the rent being due a formal notice from the landlord would not be necessary: *Brown v. Ruttan* (1849) 7 U. C. R. 97; *Andrews v. Dixon* (1820) 3 B. & Ald. 645; *Riseley v. Ryle* (1843) 11 M. & W. 16.

If the sheriff has notice or knowledge of the claim for rent at any time before he has sold the goods, or before he has paid over the proceeds to the execution creditor though after the removal, he is bound to retain and pay over the rent to the landlord, and it is no defence that there remain sufficient goods on the premises to satisfy the rent in arrear: *Corporation of Kingston v. Shaw* (1861) 20 U. C. R. 223; and see *Galbraith v. Fortune* (1859) 9 U. C. C. P. 211.

The notice may be given after the goods have been removed from the demised premises, or even after the sale or before payment over to the execution creditor: *Corporation of Kingston v. Shaw*; *Arnitt v. Garnett*; (post) *Yates v. Rattledge* (ante).

Where the sheriff has notice or knowledge of rent due to the landlord, he should endeavour to secure legal evidence on that point and if possible inspect the lease. He should also forthwith give notice to the execution creditor or his attorney of the rent in arrear and request him to pay the same to the landlord or his bailiff pursuant to the statute; in default thereof the sheriff will withdraw from possession of the goods seized: per Hagarty, C.J., in *Locke v. McConkey* (1876) 26 U. C. C. P. 480.

Notice to the execution creditor is not necessary: *Palgrave v. Windham* (1719) 1 Stra. 212, 214; *Arnitt v. Garnett* (1820) 3 B. & A. 440.

### *The Sheriff's Liabilities.*

From all the authorities it seems clear: (1) That the sheriff is only liable to the landlord for removal of the goods without payment of the rent, not merely for the seizure. (2) That the proper course is not for the sheriff to sell and pay the rent and apply the residue to the execution (except by consent) but to require the execution creditor to pay the rent. (3) It is an error to suppose that the sheriff is not bound to make a seizure at all unless and until the execution creditor will either pay the rent, of which the sheriff is aware, or indemnify him against the consequences. The sheriff must enter and seize without an indemnity and without waiting until the execution creditor pays the rent, but he need not sell goods until the rent be paid, and if the execution creditor will not pay the rent the sheriff may return *nulla bona* and withdraw from possession: *Locke v. McConkey* (1876) 26 U. C. C. P. 475; and see also *MacLean v. Anthony* (1884) 6 O. R. 330; *Cocker v. Musgrove* (1846) 9 Q. B. 223; *White v. Binstead* (1853) 13 C. B. 304.

Where the sheriff receives notice under the statute he cannot sell until he pays the rent, no matter what the value of the goods may be. If the sheriff removes the goods without paying the landlord a year's rent, the measure of damages is *prima facie* the amount of rent



due, but it is competent for the sheriff to prove in mitigation of damages that the value of the goods removed was less than the rent due: *Thomas v. Mirehouse* (1887) 19 Q. B. D. 563; 56 L. J. Q. B. 653.

The fact that the sheriff sells goods which do not belong to the real owner, and then pays the proceeds to the latter, will not relieve him from an action under the statute for not paying a year's rent to the landlord: *Forster v. Cookson* [p. 517, *ante*]; *White v. Binstead* (*supra*).

The statute does not require the sheriff to pay the rent to the landlord before removal. If the goods be sold and remain on the premises the landlord's claim under the statute does not arise because his right of distress is not taken away, and he may distrain after the sheriff withdraw. If the sheriff remain an unreasonable time in possession before the sale an action will lie against him, even if the landlord may not distrain: *Maclean v. Anthony* (*supra*): per Rose, J.; *Hughes v. Towers* [*ante*, p. 515].

Where a landlord, after the removal of the goods by the sheriff, makes a claim for rent to be deducted out of the proceeds of an execution under the New Brunswick Act, the sheriff is entitled to a reasonable time to enquire into the demand, and where the tenant had denied that any rent was due and the landlord refused to allow the sheriff time to make the enquiry, the Court refused to allow the costs of an application to compel the sheriff to pay the rent: *Nowlin v. Anderson* (1849) 6 N. B. R. 497.

A sheriff, having seized goods of a tenant under a *fi. fa.*, left them in the possession of the tenant, taking a receipt from him and an adjoining farmer. The landlord of the premises afterwards placed a distress warrant in the bailiff's hands and levied and sold the goods, and purchasing them in he left them on the premises under charge of his former tenant as a hired servant, his lease having expired. The sheriff without any subsequent seizure proceeded as if the goods were the original tenant's and sold them under the original *fi. fa.* Between the seizure by the sheriff and the landlord's sale, the

latter had given the sheriff notice of his claim for rent, and it was held that the sheriff was liable to the landlord for the amount of the rent due at the time of the seizure and for damages to the value of the goods over the rent due: *Robertson v. Fortune* (1859) 9 U. C. C. P. 427.

As between the execution debtor and the sheriff, the latter is not entitled to levy the amount of the landlord's rent until the latter has made a claim therefor: *Gawler v. Chaplin* (1848) 2 Exch. 503, 7. The sheriff cannot deduct his poundage from the rent: *Gore v. Gofton* (1725) 1 Stra. 643.

If the sheriff is sued for selling without satisfying the landlord's claim, evidence that the value of the goods seized exceeded the amount of the rent due is sufficient in the absence of evidence by the defendant of the amount which the goods realized on sale: *Shirriff v. Vye* (1885) 24 N. B. R. 572.

The Act gives the landlord two remedies, one by action, the other by motion, for an order calling on the sheriff to pay over as much of the proceeds of the goods as will satisfy a year's rent if so much be in arrear, and the costs of the application: *Sharp v. Fortune* (*ante*).

The action on the statute lies if the sheriff remove the goods from the demised premises without payment of rent: *Maclean v. Anthony*; *Shirriff v. Vye*; *Riseley v. Ryle* (*ante*).

In *Ingraham v. McKay* (1913) 46 N. S. R. 518; 8 D. L. R. 132 [Ct. en B.], the goods of a tenant were seized under execution. The landlord put in his claim for rent. By an arrangement between the landlord and the sheriff, the goods were sold upon the premises for \$455, without the rent being first paid. The rent amounted to \$195. The landlord was the purchaser. In paying for the goods he gave two cheques, one for \$260, and one for \$195. This latter cheque he contended the sheriff was not to cash, but to return to him in payment of the rent, and he countermanded payment of it. The sheriff sued thereon. The Court en Banc held that he could not recover, as the landlord was entitled to retain the rent out of the purchase-money. See also p. 470, *ante*.

*County Court Executions.*

In Manitoba and Ontario special provisions have been made in reference to proceedings in the County Courts and Division Courts respectively: R. S. M. 1913, c. 44; ss. 296-300; R. S. O. 1914, c. 63; ss. 214 to 216.

The 8 Anne, c. 14, is repealed as to these Courts. The latter statute excuses the sheriff from selling at all when rent is claimed until or unless the execution creditor shall pay the rent, and then it empowers the sheriff to sell for his benefit as well for the rent as the execution money, whereas under the Acts in reference to the County and Division Courts, the bailiff sells for and on behalf of the landlord as on a distress, and the creditor is not to be paid his debt until the landlord has been paid his rent: *Lockhart v. Gray* (1867) 2 C. L. J. 163.

The Acts provide that written notice of his claim must be given by the landlord to the bailiff making the levy. Where the notice to the bailiff followed the form fixed by the Division Court rules and used the words "for one year's rent ending," etc., without expressly showing whether the tenancy were monthly, weekly or yearly, it was held sufficiently to show the terms of the holding: *Claxton v. Sly* (1881), 1 C. L. T. 190.

The notice to the bailiff does not constitute him the landlord's agent to distrain, but in doing so he acts as an officer of the Court pursuant to the statute: *Gage v. Collins* (1867), L. R. 2 C. P. 381.

It would appear that the interpleader rules apply to the landlord's claim for rent under these statutes, and where the landlord appears upon the hearing of an interpleader summons in a County Court he, as well as the execution creditor and the claimant, has a right of appeal: *Foulgar v. Taylor* (1860) 5 H. & N. 202; *Gage v. Collins* (*ante*).

The bailiff cannot distrain the goods of a stranger for rent due the landlord: *Beard v. Knight* (1858), 8 E. & B. 865; *White v. Binstead* (1853) 13 C. B. 304.

These Acts apply when the wife of the execution debtor is lessee, and are not limited to cases where the goods seized in execution are the property of the tenant

of the house in respect of which the rent is owing: *Hughes v. Smallwood* (1890), 25 Q. B. D. 306.

The provisions of the Landlord and Tenants Acts noted at p. 458, *ante*, as to goods of third persons, would not seem to alter the law in this respect, at all events in favor of husband or wife. But the execution must be rightful, and the creditor must be rightfully in possession of the goods of the debtor.

The cases of *Beard v. Knight*, and *Foulgar v. Taylor*, (*ante*), are distinguishable from *Hughes v. Smallwood* (*ante*), on the ground that in the former the goods seized in execution on the defendant's premises were those of a stranger and not of the execution debtor. In such case the true owner is entitled to have the goods back: see also *White v. Binstead* (*supra*).

The Manitoba Distress Act, R. S. M., 1913, c. 55, s. 3 [see p. 391, *ante*], enacts that except as otherwise provided in "The County Courts Act," no person shall be at liberty to claim as against any writ of execution or attachment issued out of any Court of this Province, or to distrain as against the tenant or any other person for more than three months' arrears of rent where the same is payable quarterly or more frequently, nor for more than one year's arrears where the same is payable less frequently than quarterly: see *Stobart v. Bradford* (1891), 2 W. L. T. 72.

Compare the provisions of the British Columbia County Court Act R. S. B. C., 1911, c. 53, s. 146.

### RESISTING IMPROPER DISTRESS.

ARTICLE 84.—Where a tenant desires to resist what he considers improper or illegal distress, his ordinary remedy is by replevin: it is questionable whether the remedy by injunction is open to him: in Ontario he has a statutory remedy under the provisions of the Landlord and Tenant Act.

[Authorities: *Farr v. Kert* (1916) 27 O. W. R. 447; *Neal v. Rogers* (1910) 22 O. L. R. 588; 2 O. W. N. 1107; 17 O. W. R. 1070.]

The person whose goods have been wrongfully distrained has a choice of remedies. He may sue in replevin, or may bring an action for damages for improperly distraining. The former remedy is available only when the distress is illegal, the latter proceeding is applicable whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only or for double value.

### *Replevin.*

Under the law of England, replevin may be brought by the owner of goods or cattle which have been wrongfully taken under a distress for rent, or for damage feasant. But it is not confined strictly to distresses, but extends to all wrongful takings of goods or cattle: Com. Dig. tit. Replevin, (A.); Id. tit. Pleader, (3 K. 1); Bull. N. P. 52; *Shannon v. Shannon* (1804) 1 Sch. & Lef. 327; *George v. Chambers* (1843) 11 M. & W. 159; *Allen v. Sharp* (1848) 2 Exch. 352; *Mellor v. Leather* (1853) 1 E. & B. 619; 22 L. J. (M. C.) 76; *Mennie v. Blake* (1856) 6 E. & B. 842; 25 L. J. (Q. B.) 399.

The remedy is inapplicable to an unlawful taking of fixtures annexed to the freehold: *Niblet v. Smith* (1792) 4 T. R. 504; *Gibbs v. Cruickshank* (1873) L. R. 8 C. P. 454; or any other things not subject or liable to a distress; ex. gr., deeds and charters, money, animals *feræ naturæ*: Bac. Abr. tit. Replevin, (F.).

Replevin lies for goods protected from distress [see Article 71 and 72]: goods or cattle distrained for rent before sunrise or after sunset, or on a *dies non*; [see Article 67], goods or cattle taken after the outer door has been unlawfully broken to distrain [see Article 69], and in all other cases where the taking of the particular articles was wholly illegal, and not merely irregular or excessive [see Articles 51 and 52].

Replevin is in effect no remedy where the distress was originally lawful: *Johnson v. Upham* (1859) 28 L. J. (Q. B.) 252; 2 E. & E. 250; unless it has become illegal

by a sufficient tender of the rent or damage done, with expenses, being made before the impounding, and a subsequent wrongful detention, which in effect and construction of law amounts to a new wrongful taking: *Deal v. Potter* (1867) 26 U.C.R. 578; *Scarth v. Ontario Power Co.* (1893) 24 O. R. 446. If a man having a right to distrain for £5, distrains for £500, a replevin (without making a sufficient tender before the impounding) is not the proper remedy, but only an action for an excessive distress: *Whitworth v. Smith* (1832) 1 Moo. & R. 193; 5 C. & P. 250.

With respect to distress for rent, neither the removal of the distress from the demised premises after five days, nor an appraisalment of the distress, takes away the tenant's right to replevy: *Jacob v. King* (1814) 5 Taunt. 451; 1 Marsh, 135; for, so long as the goods remain unsold, the tenant may replevy, although after the five days allowed by the statute, the property still remaining in him: See pp. 493 and 504 (*ante*).

If at the end of the five days the goods be appraised, but not sold, the tenant may still replevy, for until they are sold the property therein remains vested in him: *Jacob v. King* (*ante*); *Moore v. Pyrke* (1809) 11 East. 52, 4; *Macdonald v. Cummings* (1892) 8 M. R. 406, and see p. 493, *ante*.

By the Replevin Act, R. S. O. 1914, c. 69, s. 3: "Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities, or other personal property or effects, have been wrongfully distrained or have been otherwise wrongfully taken or detained the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin." But an action of replevin shall not be brought to take out of the custody of the sheriff, bailiff, or other officer, any personal property seized by him under process against such party: *Id.*, s. 4.

The County and District Courts have jurisdiction: *Id.*, s. 8. [And see R. S. O. 1914, c. 59.] Also the Division Courts: *Id.* s. 9.

Under this Act replevin will lie though there has been no wrongful taking, but a detention only is complained of, for every detention is a new taking: *Deal v. Potter* (1867) 26 U. C. R. 578; *Lewis v. Teale* (1871) 32 U. C. R. 108. In this respect *Mennie v. Blake* (1856) 6 E. & B. 842, is overruled. Where a party in possession of goods, on being asked for them, asserts title in himself, this is a wrongful detention, for which an action of replevin will lie, and the owner is not compelled to bring an action for damages: *Scarth v. Ontario Power Co.* (*ante*).

In replevin substantial damages, besides expenses of replevin bond, are recoverable; therefore it is a bar to an action for trespass to the same goods: *Gibbs v. Cruickshank* (1873) L. R. 8 C. P. 454; 42 L. J. (C. P.) 273; *Graham v. O'Callaghan* (1887) 14 A. R. 477; see also *Phillips v. Berryman* (1783) 3 Doug. 286.

#### *Similar Legislation.*

Alberta: (1907) 7 Edw. VII. c. 3, Rule 467, and see C. O. c. 4 [District Courts].

British Columbia: R. S. B. C. 1911, c. 53, s. 30 (4), County Courts given jurisdiction up to \$1,000.

Manitoba: R. S. M. 1913, c. 46, Rule 856; c. 44, s. 222 [County Courts].

Nova Scotia: R. S. N. S. 1900, c. 172, s. 2 (2): replevin bond.

#### *Damages.*

This subject is discussed at pp. 529, *et seq.* (*ante*).

#### *Injunction.*

##### *Prior to the Judicature Act.*

"Before the Judicature Act when a tenant desired to dispute his landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods. He could not resort to equity for an injunction." Per Middleton, J., in *Neal v. Rogers* (1919) 22 O. L. R. 588, at 589; 2 O. W. N. 1107; 17 O. W. R. 1070.

*Since the Judicature Act.*

“For some time after the Act was passed there was much uncertainty as to the effect of (the) section . . . giving to the Court the right to grant an injunction when ‘just and convenient.’ The view that has ultimately prevailed is that the Courts should only grant an injunction now when formerly the Court of Chancery would have done so.” Per Middleton, J., in *Neal v. Rogers* (*supra*). See this view discussed in *Keay v. City of Regina* (1912), 22 W. L. R. 185, 6 D. L. R. 327; 2 W. W. R. 1072 [Ct. en B.—Sask.].

Where tenants sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, it was held that the injunction should be continued only if the rent were paid into Court: *Shaw v. Earl of Jersey* (1879) 4 C. P. D. 120; 48 L. J. Q. B. 308 [C.A.].

In *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 [C.A.], an injunction to prevent a distress was granted on the rent being paid into Court.

Speaking of these two cases Middleton, J., in *Neal v. Rogers* (*supra*), said, p. 589: “Since the Judicature Act there are two reported cases in which an injunction has been granted. Neither . . . can now be regarded as authoritative. In *Shaw v. Earl of Jersey*, Lord Coleridge, C.J., in granting the injunction, stated that the order was without precedent, and granted the order on terms fully as onerous as in replevin, *i.e.*, payment into Court of the rent claimed. In *Walsh v. Lonsdale*, the jurisdiction to make the order was not discussed—payment into Court was required, and upon this being submitted to, the defendant assented to the injunction.” And see per Armour, C.J., in *Pegg v. Starr* (1892) 23 O. R. 83, at p. 91, and *Walton v. Henry* (1889) 18 O. R. 620. In *Neal v. Rogers* the injunction was sought on three grounds: (1) No rent due; (2) no notice of cause of taking, and (3) rent not payable at a time certain. It was held: (1) Depended upon a disputed question of



fact; (2) was one the landlord could remedy; (3) rested upon a legal proposition by no means clear: it was clearly not "just and convenient" to grant an injunction and deprive the landlord of his security if in the end he turned out to be right—unless other equally good security were substituted. Replevin was a cheaper, more just and more convenient remedy. Middleton, J., would have permitted the applicant to turn his motion into a motion for judgment if it had been certain that he was right in his contention upon ground (3), that upon the landlord's own statement there was no right to distrain.

In *Alderson v. Watson* (1915) 35 O. L. R. 564 [Britton, J. — App. Div.], treated an application for an injunction to restrain a distress and sale as a motion for judgment where he had all the facts before him—and he granted the injunction. The question of the right does not appear to have been raised.

And see the argument in *Bancroft v. Richards* (1913) 3 W. W. R. 826 [B.C.—C.A.].

In *Farr v. Kert* (*supra*), a tenant was allowed to continue an interim injunction until trial, on terms of paying into Court the value of the goods distrained.

*Wright v. Fitzpatrick* (1914) 27 W. L. R. 738 [Man.—Macdonald, J.], was a case of illegal distress—no rent being due—and an injunction to restrain the bailiff from proceeding on the distress was made perpetual.

### *The Statutory Remedy in Ontario.*

The Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, contains the following provisions:

64. In this Part,

"Judge" shall mean Judge of the County or District Court of the county or district in which a distress to which this Part applies is made.

65. Where goods or chattels are distrained by a landlord for arrears of rent, and the tenant disputes the right of the landlord to distrain in respect of the whole or any part of the goods or chattels, or disputes the amount claimed by the landlord, the tenant may apply to the

Judge to determine the matters so in dispute, and the Judge may hear and determine the same in a summary way, and may make such order in the premises as he may deem just.

66. Where notice of such an application has been given to the landlord the Judge, pending the disposition of it by him, may make such order as he may deem just for the restoration to the tenant of the whole or any part of the goods or chattels distrained, upon the tenant giving security, by payment into Court or otherwise as the Judge may direct, for the payment of the rent which shall be found due to the landlord and for the costs of the distress and of the proceedings before the Judge and of any appeal from his order, or such of them as the tenant may be ordered to pay.

67. The Judge shall have jurisdiction and authority to determine any question arising upon the application which the Court of which he is Judge has jurisdiction to determine in an action brought in that court.

68. Where the amount of the rent claimed by the landlord exceeds \$800 or where any question is raised which a County or District Court would not have jurisdiction to try in an action brought in such Court, the Judge shall not, without the consent in writing of the landlord, deal with the application summarily, but shall direct an action to be brought or an issue to be tried in the Supreme Court for the determination of the matters in dispute.

69.—(1) Where the Judge under the next preceding section, directs an action to be brought or an issue to be tried, he shall have the like power as to the restoration to the tenant of the goods or chattels or of any part of them as is conferred by section 66, and where it is exercised the security shall be as provided in that section, except that, as to costs, it shall be not only for the costs of the proceedings before the Judge, but also for the costs of the action or issue, including any appeal therein or such of them as the tenant may be ordered to pay.

(2) The Supreme Court shall determine by whom and in what manner the costs of the action or issue and of the application to the Judge shall be borne and paid.

(3) Judgment may be entered in accordance with the direction of the Court, made at or after the trial, and may be enforced in like manner as a judgment of the Court.

70. Where the amount claimed by the landlord does not exceed \$100 the decision of the Judge shall be final.

71. Where the amount claimed by the landlord exceeds \$100 an appeal shall lie from any order of the Judge made on an application to him under the provisions of section 65, by which the matters in dispute are determined, in like manner as if the same were a judgment of the Court of which he is Judge, pronounced in an action.

72. Where an issue is tried there shall be the same right of appeal from the judgment as if the judgment had been pronounced in an action.

73. Where the amount claimed by the landlord does not exceed \$100 the costs of the proceedings before the Judge shall be on the Division Court scale, and where the amount claimed exceeds \$100 they shall be on the County Court scale, except in an action or issue in the Supreme Court directed under Section 68.

74. Nothing in this Part shall take away or affect any remedy which a tenant may have against his landlord or require a tenant to proceed under this Part instead of by bringing an action, but where, instead of proceeding under this Part he proceeds by action, the Court in which the action is brought, if of opinion that it was unnecessarily brought, and that a complete remedy might have been had by a proceeding under this Part, may direct the tenant although he succeeds, to pay any additional costs occasioned by his having brought the action.

See *Re Little & Beattie* (1917) 38 O. L. R. 551 [App. Div.].

These provisions were not copied in Saskatchewan in 1919.

## CHAPTER X.

### QUIET ENJOYMENT.

ARTICLE 85.—*The Effect of the Covenant.*

Express or implied.  
Scope of the covenant.  
Lawful or unlawful act.  
Defective title.  
Enjoyment of premises.  
Landlord's user of adjoining premises.  
"Quietly."  
Acts constituting breach.  
Trespass and eviction.  
Expropriation.  
Diverting premises to another use.  
Covenants restricting use.

ARTICLE 86.—*When the Covenant is Broken.*

ARTICLE 87.—*The Remedy for a Breach.*

ARTICLE 88.—*Restraining a Breach.*

### THE EFFECT OF THE COVENANT.

ARTICLE 85.—The covenant for quiet enjoyment [express or implied] is an assurance against the consequences of a defective title, and of any disturbance thereupon; or of any substantial interference—by the covenantor or those lawfully claiming under him—with the enjoyment of the premises for all usual purposes.

[Authorities: *Howell v. Richards* (1809) 11 East 633; *Dennett v. Atherton* (1872) L. R. 7 Q. B. 316; *Robinson v. Kilvert* (1889) 41 Ch. D. 88 [C. A.]; *Sanderson v. Berwick-on-Tweed Corporation* (1884) 13 Q. B. D, 547 [C. A.]; 18 Hals. s. 1029].

The lessee's right to possession is dealt with under Article 19, p. 172, *ante*.

The covenant is a "usual covenant." See Article 16.

*Express or Implied.*

The implied covenant is dealt with at p. 153, *ante*, and it also there appears that it is displaced by an express covenant.

And where after taking a lease the lessee discovers a defect of title, which he might have discovered on investigation before completion; if there be no contract to make compensation, he cannot in the absence of fraud recover where the implied covenant, which would have arisen from the demise, is excluded by an express qualified covenant for quiet enjoyment: *Clayton v. Leech* (1889) 41 (Ch. D. 103 [C. A.]; *Besley v. Besley* (1878) 9 Ch. D. 103, held not to be overruled by *Palmer v. Johnson* (1884) 13 Q. B. D. 351. The latter case shows that the lessee might have a remedy on a clause of compensation not dealt with by the lease: see *Smith v. Tennant* (1892) 20 O. R. 180.

*The Scope of the Covenant.*

The express covenant is a matter of contract; it may be "restricted" or "qualified" to the acts of the lessor and those claiming under him or it may be "absolute," in which case it extends to the acts of persons claiming by title paramount: 18 Hals. s. 1023.

It has been seen [p. 154, *ante*] that the implied covenant is absolute. The Short Forms covenant is qualified: [p. 1115, *post*].

The usual express covenant is that "the lessee shall enjoy the premises without lawful interruption by the lessor or persons rightfully claiming under him."

This covenant has been held to mean that the lessor is only liable for acts of interruption by himself or persons deriving title under him to do the act complained of: *Harrison v. Lord Muncaster* [1891] 2 Q. B. 680; [noted at p. 549, *post*]; *Williams v. Gabriel* [1906] 1 K. B. 155; 22 T. L. R. 217; 26 C. L. T. 207, and see (1909) 29 C. L. T. 760.

The covenant for quiet enjoyment in a lease is intended as an indemnity against the acts of those who have a lawful title before the lease is entered into. It will not extend to matters subsequently done by a superior authority, such, for instance, as an expropriation by a railway company, under their statutory powers, of part of all the premises demised. By letters patent, bearing date in 1840, certain lands, situate on the water's edge in Toronto, were granted to one A.; the patent containing a condition for the erection of an esplanade, according to a certain plan, within three years from the date thereof. A. demised the lands to a person through whom the plaintiff claimed, with full covenants for quiet enjoyment, and a covenant by the lessee to build the esplanade according to the letters patent. By certain statutes, afterwards passed, it was enacted that unless the owners or lessees should within twelve months erect the esplanade the city should do it, and under these statutes they entered, and by filling up the space between the water's edge and the esplanade prevented the working of the plaintiff's mill, and this was claimed to be a breach of the covenant for quiet enjoyment. It was held that the act being done under superior authority, namely, the Legislature, accruing after the lease was made and in consequence of the neglect of the lessee, and not from the neglect, fraud or procurement of the lessor, the latter was not liable. The city did not derive their right through the lessor, and it did not exist when the covenant was made, and was in no sense a prior or paramount title: *Snarr v. Baldwin* (1861) 11 U. C. C. P. 353.

A railway company requiring land for their station and grounds fenced it in with the consent of the owner, but the amount to be paid for it was not then agreed upon. The company made a lease of a part, and afterwards the owner, who had not been paid for the land, put up a fence which interfered with the lessee's enjoyment; and it was held that the covenant in the lease for quiet enjoyment was not broken, for the lessors could not be dispossessed, the owner's only remedy against them under the statutes being for compensation: *Clarke v. Grand Trunk Ry. Co.* (1874) 35 U. C. R. 57.

And see *Manchester Railway Co. v. Anderson* [1898] 2 Ch. 394.

The question of compensation is discussed at pp. 543 and 557, *post*.

### *Lawful or Unlawful Act.*

The question is raised as to the value of the word "lawful" and whether the covenant applies both to lawful and unlawful acts.

A covenant for quiet enjoyment, if limited to the acts of the lessor, or those claiming under him, does not extend to wrongful acts, or if general, and an indemnity against the acts of all persons, only lawful acts are meant: *Nash v. Palmer* (1816) 5 M. & S. 379; *Jeffreys v. Evans* (1865) 19 C. B. N. S. 246; *Snarr v. Baldwin* (*ante*). It is clear from the case of *Sanderson v. Berwick-on-Tweed Corporation* (1884) 13 Q. B. D. 547 [C. A.], that where the covenant is limited to the acts of the lessor, and those claiming under him, he is not liable for an unlawful act by one so claiming.

If the covenant be against the acts of particular individuals, it extends to all their acts, whether lawful or unlawful: *Nash v. Palmer* (*supra*); *Fowley v. Welsh* (1822) 1 B. & C. 29; and if the disturber do not claim under the lessee himself, a covenant against all persons claiming, or pretending to claim, a right, extends to tortious as well as lawful interruptions: *Chaplain v. Southgate* (1717) 10 Mod. 384; *Ibbett v. De La Salle* (1860) 6 H. & N. 233. So that it is clear the parties may by express words create a liability extending beyond the lawful acts of the lessor, and those claiming under him.

"The acts coming within the protection of the covenant are, as a general rule, only those of a lawful character, though if they are the acts of the lessor himself, their legality or illegality is immaterial": (1909) 29 C. L. T. 759, 760 (Article).

The express covenant in the various Short Forms Acts is limited to the acts of the lessor and those claiming under him. But the parties are not bound to adopt this form, except in Alberta and Saskatchewan: see p.

94, *ante*. If the covenant is "against all persons whatsoever lawfully claiming the same": *Williams v. Burrell* (1845) 1 C. B. 402; or that the lessee "shall peaceably and quietly enjoy during the term": *Onions v. Cohen* (1865) 2 Hem. & M. 354; 34 L. J. Ch. 338; it will be absolute and extend to all persons who have or acquire a rightful title to the property during the continuance of the term: see *Howell v. Richards* (1809) 11 East 633.

As has been seen, an implied covenant or covenant in law ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted: *Baynes v. Lloyd* [*ante*, p. 153].

But an express covenant would continue in force until the end of the term which the lease purported to grant: *Williams v. Burrell* (*supra*); even where such covenant is entered into by a tenant for life; *Lock v. Furze* (1866), 19 C. B. N. S. 96; L. R. 1 C. P. 441; 35 L. J. C. P. 141.

#### *A Defective Title.*

The lessee is a purchaser *pro tanto* to whom the maxim *caveat emptor* applies: *Clayton v. Leech* (1889) 41 Ch. D. 103 [C. A.]; *Woods v. Opsall* [1918] 1 W. W. R. 985 [B. C.—Macdonald, J.].

Therefore, he must ascertain the sufficiency of the lessor's title: *Spencer v. Marriott* (1823) 1 B. & C. 457.

If the conveyance to the lessor prevents the user of the premises for any particular trade or business, the lessee will not be allowed to carry on such business, for he has notice of his lessor's title: *Parker v. Whyte* (1863) 1 Hem. & M. 167; *Clements v. Welles* (1865) L. R. 1 Eq. 200. In such case, he should obtain an unqualified covenant for quiet enjoyment: *Onions v. Cohen* (1865) 2 Hem. & M. 354.

#### *The Enjoyment of the Demised Premises.*

As a general rule the lessor retains no rights over premises demised by him.

To this rule there is a well established exception in the case of easements of necessity: *Wheeldon v. Burrows* (1879) 12 Ch. D. 31; *Davies v. Sear* (1869) L.R. 7 Eq. 427.



These the lessor does retain, but they are strictly re-grants, and not reservations, in his favour: *Wickham v. Hawker* (1840) 7 M. & W. 63; *Houstoun v. Sligo* (1886) 55 L. T. 614.

As they pass by the lease, the enjoyment is limited to that which became necessary at the date of the lease: *Corporation London v. Riggs* (1880) 13 Ch. D. 789.

Also the tenant will be restrained from using the premises for any other purpose than that contemplated at the time of the lease.

And there may be express stipulations between the parties restricting the user of the premises by the tenant.

The question of what passes with the demised premises is dealt with at p. 131, [*ante*].

### *The General Rule.*

“The tenant gets a true property in his holding for the term for which the lease was granted. He has the right to occupy the land, to cultivate it and to maintain and recover possession of it against all others, including his landlord”: per Lamont, J., in *Klinck v. Geer* (1910) 14 W. L. R. 282; 2 Sask. L. R. 157 at p. 287.

The landlord may not enter upon the demised premises during the term unless [1] there is an express provision in the lease for entry—as in the case of a clause giving the right to enter and view the state of repair [as to which see p. 605] or [2] there is a breach of condition: see Article 113 or [3] if a right of re-entry for covenant broken is reserved in the lease; see Article 114, p. 713]; or [4] he has covenanted to repair—as to which see Article 101.

The statutory provisions as to entry during the term—which are noted at p. 164 [*ante*] should also be considered.

If he has none of the above rights he is either guilty of a trespass or has worked an eviction.

After a lease is made a written consent under seal would be necessary to enable the lessor to pass and re-pass over the demised premises; or such license should

be founded on mutuality of consideration so as to support it as an agreement respecting an interest in lands or an easement: *Brougham v. Balfour* (1853) 3 U. C. C. P. 297.

In the absence of an express stipulation to the contrary, a tenant is entitled to the use of the premises leased at all hours. The agent of an insurance company at Toronto negotiated for a lease to the plaintiffs, who were barristers, etc., of one flat of the company's offices for three years at \$600 a year, and executed the lease on the part of the company, containing the usual covenant for quiet enjoyment, and received the rent. The caretaker of the building locked the outer street door at 6 p.m., thus excluding the plaintiffs after that hour, and the agent refused to let them have a key unless they got the caretaker to be present; this was held clearly a denial of the plaintiff's rights under the lease, and the company were responsible for the acts of their agent: *MacLennan v. Royal Insurance Co.* (1876), 39 U. C. R. 515.

A landlord putting a tenant into possession under a verbal lease has no right to go upon the premises to drill for oil: *Hare v. Krick* (1906) 8 O. W. R. 620, affirmed (1907) 9 O. W. R. 958 [Div. Ct.].

It was formerly laid down that the covenant for quiet enjoyment was intended to secure title and possession: not to guarantee to the lessee any particular user of the demised premises: *Spencer v. Marriott* (1823) 1 B. & C. 457.

In an under-lease from A. to B., there was a covenant that B. should hold the premises without any lawful let, suit, interruption, or eviction by A., or by or through his acts, means, right, title, forfeiture, etc. A. held under a lease for a longer term, which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The under-lease contained no such clause, nor was B. informed of it. He underlet to C., who incurred a forfeiture by using the premises for a shop, and the original lessor thereupon evicted him. It was held that this was not an eviction by means of A., within the meaning of his covenant: *Spencer v. Marriott* (*supra*).

This case was affirmed in *Dennett v. Atherton* (1872) L. R. 7 Q. B. 316; 41 L. J. (Q. B.) 165 [Ex. Ch.]. That was a case where a lessee was prohibited from carrying on certain trades, but not from selling beer; it was held that a covenant for quiet enjoyment did not make the lessor liable when the lessee was restrained from selling beer by the former owner, who had conveyed to the lessor on condition that such business should not be carried on, for there was here, not a defect of title, but an interference with a particular mode of enjoying the property.

The principle has, however, been departed from in recent decisions, which extend the operation of the covenant so as to prohibit any interference with the enjoyment of the premises for all usual purposes: see 18 Hals. s. 1029, note (t), and *Robinson v. Kilvert*, noted at p. 544.

A lessor covenanted to keep premises in proper repair and condition, so as to be available for storing cartridges, and covenanted also for quiet enjoyment; and it was held that the covenant referred only to the physical condition of the premises, and did not amount to a warranty that it would be legal to store cartridges there in the face of an Act of Parliament afterwards passed: *Newby v. Sharpe* (1878) 8 Ch. D. 39; 47 L. J. (Ch.) 617 [C.A.], and see this case also considered at p. 300 [*ante*].

See also *Spurling v. Bantoft* [1891] 2 Q. B. 384; *G. Tambllyn, Ltd., v. Austin* (1920) 18 O. W. N. 357; 48 O. L. R. 97; 54 D. L. R. 663 [Kelly, J.].

The covenant does not oblige the lessor to rebuild in case the premises are destroyed: *Brown v. Quilter* (1764) Amb. 619.

Where land which is in possession of a tenant under a lease is expropriated separate amounts should be awarded to both landlord and tenant. *Pacific Great Eastern Railway Co. v. Larsen and Linton & Co.* (1915) 8 W. W. R. 1 [B.C.—Macdonald, J.], referring to *Johnston v. Ontario Simcoe and Huron Railway Co.* (1853), 11 U. C. R. 246.

*The Landlord's User of Adjoining Premises.*

A landlord, who lets part of his property for the purpose of a particular trade, is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder, on the ground that such use injures a particular class of his tenant's goods; it not having been known to him at the letting, and not being a matter of common knowledge that that particular class of goods was liable to be so injured. Nor is such user by a landlord a breach of his covenant for quiet enjoyment. Nor is the landlord liable when his user does not amount to a nuisance. But a process, not in itself noxious, cannot be complained of as a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property: *Robinson v. Kilvert* (1889) 41 Ch. D. 88; 58 L. J. (Ch.) 392 [C. A.].

S. was the owner of several houses, and in the conveyance to him there was a covenant that he would not carry on, or permit to be carried on, any trade or business, but would keep the houses as private dwellings. In letting one of the houses to M., the solicitor of S. sent to M. a draft lease, with a letter ending, "I may, perhaps, add that the draft is the form used for all the houses on S.'s estate." The draft contained a restrictive covenant of the same nature, as that in the conveyance to S., and against it was a note, "There is a covenant to this effect in the conveyance to S." Six years afterwards, M. negotiated with S. for a long lease of the same house at a high premium, and a draft agreement was sent, which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in leases of his other houses. M.'s solicitor thereupon wrote for the form of lease used by S., and a copy of a lease containing the restrictive covenant was sent, and a lease was granted to M. containing a similar covenant. The Court held that S. was bound not to permit any of his other houses to be used for the purposes of trade: *Spicer v. Martin* (1888) 14 A. C. 12; 58 L. J. (Ch.) 309.

Where a lessor demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on; but this obligation does not extend to special branches of the business which require special protection, unknown to the lessor when he made the lease. A lease was granted in order that the land demised might be used by the lessee for the purpose of carrying on the business of a timber merchant, which required a free current of air to the drying shed for the purpose of seasoning the timber, and the lessee covenanted to carry on such business; it was held that the assigns of the lessor were not entitled to build upon adjoining property, acquired by them from him, so as to interrupt the access of air, and thus interfere with the carrying on of the business in the ordinary course: *Aldin v. Latimer, Clark, Muirhead & Co.* [1894] 2 Ch. 437; 63 L. J. (Ch.) 601.

*Tebb v. Cave* [1900] 1 Ch. 642, decided that building on adjoining premises so as to deprive the demised premises of a current of air and cause them to smoke was a breach of the covenant. And see *Gregory v. Tunstall* (1909) 15 W. L. R. 140.

But this was disapproved in *Davis v. Town Properties Investment Corporation, Limited* [(1903) 1 Ch. 797 [C. A.]]. There a lessor of an office building in which the plaintiff was a tenant conveyed the reversion to the defendants during the term. Later the defendants purchased the adjoining land and so erected a building on it that the plaintiff's chimney smoked and materially affected his enjoyment of one room. There was a covenant for quiet enjoyment in the lease, but it was held there was no breach. This case turned on the point that at the time of the lease the lessor had no interest in the adjoining land and the rights of the lessee were limited by the fact that the owner of the adjoining land might, if he desired, build on it in the manner the defendants had done.

A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified; and at the time of the grant he held an adjoining house for a term of years. Subsequently he acquired the reversion expectant on the term in the adjoining house, thus merging the term; and it was held that he was entitled to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights: *Booth v. Alcock* (1873) L. R. 8 Ch. 663; 42 L. J. (Ch.) 557.

And see *Potts v. Smith* (1868) L. R. 6 Eq. 311, 317, and *Robson v. Palace Chambers (Westminster) Co.* (1897) 14 T. L. R. 56.

Though an express covenant for quiet enjoyment excludes any implied covenant, still such a covenant will not permit a lessor to derogate from his own grant by using adjoining premises in such a way as to be an injury to those demised. A lessor, during the lease, had pumped water from land adjacent to the demised premises by means of powerful engines, and the lessee's house was damaged by vibration, caused by the working of such engines, to such an extent that the premises became useless to him, and he was obliged to remove his business to another house, and in consequence incurred expense. The house, at the commencement of the term, was old and unstable, and a house of ordinary stability would not have been injured by the vibration. In an action for the rent, the lessee counter-claimed for the damages caused by the lessor, and the Court held him liable on the implied obligation not to derogate from his own grant by using the adjoining property so as to interfere with the stability of the premises he had let, and that he could not, therefore, rely on any defence founded on the defective state of the premises at the commencement of the term. It was held also, that the damages were not confined to the value of the term, but included all loss which had happened as a natural consequence of the wrongful acts of the lessor, such as the expense of removing his business to other premises: *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836. [C. A.].

“Quietly”

“Quietly,” in the usual covenant for quiet enjoyment, does not mean undisturbed by noise, but uninterrupted in the possession. A. granted a lease to B. of two rooms, with a covenant for quiet enjoyment; then A. let the room above the two to C. for dancing and other entertainments. In an action by B. against A. and C., it was held that there was no breach of the covenant, though annoyance from the dancing was a nuisance, for which damages were given, but annoyance from visitors on the stairs was not: *Shaw v. Stenton* (1858) 2 H. & N. 858, and *Sanderson v. Berwick-on-Tweed Corporation*, ante; *Jenkins v. Jackson* (1888) 40 Ch. D. 71; 58 L. J. (Ch.) 124.

And in *Jaeger v. Mansions Consolidated* (1903) 19 T. L. R. 114; 23 C. L. T. 96, Buckley, J., held that a covenant that the tenant should “quietly hold and enjoy without any interruption by the landlord or any person claiming under him,” related only to freedom from disturbance by adverse claimants not necessarily limited to the turning out of the tenant, but extending to physical and not merely “metaphysical” interference with the use of the property demised as distinguished from its comfortable enjoyment. Under such a covenant the plaintiff cannot sue in respect of noise or disagreeable sights or sounds, *e.g.*, noise, improper conduct and obnoxious language, on a common staircase by tenants using other flats in the same building for immoral purposes. The action for breach was allowed to go down to trial on the ground that the plaintiff might show acquiescence by the landlord in the wrongful acts or might be entitled to enforce as against the other tenants, a covenant, contained in all the leases, not to use the premises for immoral purposes. The Court of Appeal affirmed this judgment (1903) 19 T. L. R. 145; 23 C. L. T. 96; 87 L. T. 690.

But the daily and continual use of sewing machines and thumping of pressing irons used in a dressmaker’s business carried on in an adjoining flat in an apartment

block was held to be a breach of the covenant and a nuisance in *Walton v. Biggs* (1912) 19 W. L. R. 895; 32 C. L. T. 321 [Man.—Patterson, C.Co.J.].

An action by plaintiffs, printers and embossers, tenants of defendant Weighart, against their landlord and against the other defendants, their co-tenants of the flat above them, for damages for maintaining a nuisance by reason of the noise of their machinery, and for trespass; for damages for loss of business, annoyance and discomfort, and for an injunction. It was claimed as against the landlord that he made an agreement with plaintiffs at the time of the lease that no machinery should be allowed in the front part of the building in part to be occupied by plaintiffs. Co.C. Judge, held, at trial that defendants had caused a nuisance to plaintiffs, and damaged their business, and granted an injunction restraining a continuance. It was referred to the deputy clerk to enquire and state the damages, and defendants were ordered to pay the same with costs. Divisional Court, held, that plaintiffs had failed to establish their alleged agreement with the landlord and his appeal should be allowed with costs. But as against the other defendant there was ample evidence upon which the Co. C. Judge could find a nuisance, and his finding should not be interfered with if it were clear that he had not omitted to take into consideration some of the elements. All the circumstances of the property should be taken into consideration, amongst them the notorious fact that manufactures cannot be carried on without noise and vibration and that one in a manufacturing district cannot expect to have the same freedom from annoyance of that kind which he would have a right to look for in a residential quarter. Upon the evidence it could not be said that the Co. C. Judge must needs find a nuisance in view of the nature of the locality, and therefore all the facts should be developed fully, and the Judge taking all circumstances of locality, etc., into consideration, should then find nuisance or no nuisance. New trial ordered as against the co-tenants that this aspect of the case should be determined: *Lyon v. Borland* (1911) 20 O. W. R. 321; 3 O. W. N. 204.

See also *Ellis v. White* (1908) 11 O. W. R. 184.



*Acts of the Covenantor which will Support an Action for Breach.*

Failure to give possession which is a breach of the covenant is dealt with under Article 19, p. 172, *ante*.

In order to support an action for breach of the covenant for quiet enjoyment, the interruption must either be the direct act of the lessor, or must come through some act, the consequence of which was either foreseen or ought, if reasonable care had been exercised, to have been foreseen. If the consequences flowing from an authorized act could not be foreseen or contemplated, there will be no liability. A lessor had leased two mines, A, and B., adjoining each other, with the usual covenant for quiet enjoyment against his own acts, and those claiming under him; and the lessees of mine A., while properly working it, struck a "feeder," with the result that a large body of underground water, the existence of which was unsuspected, flooded their mine, and thence flowed into mine B. It was held that the lessees of the latter had no remedy against their lessor on the covenant for quiet enjoyment: *Harrison v. Lord Muncaster* [1891] 2 Q. B. 680; 65 L. T. 481 [C. A.].

But if the lessor demise a bed of coal, and afterwards in working the minerals in the stratum above bore a hole through the roof of the mine and cause it to be flooded, there will be a breach of the covenant, though the lessor had a legal right to work the mine: *Shaw v. Stenton* (1858) 2 H. & N. 858.

Any wilful act of the lessor interfering with the lessee's possession of the property demised, including its easements, is a breach of the covenant for quiet enjoyment. Thus, if he put up a gate by which the lessee is hindered in reaching the land demised: *Andrews v. Paradise* (1724) 8 Mod. 318, or lease a water course and afterwards stop it up, or a house and estovers and destroy all the wood: *Pomfret v. Ricroft* (1669) 1 Wms. Saund. 557, Ed. 1871, and see *Rogers v. Sorell*, p. 579, *post*.

There must be something to amount to the lessor doing the act complained of or allowing it to be done;

there must be active participation by himself or his agents. Mere failure to take steps to prevent what he knows is going on will not make him liable—*e.g.*, allowing a tenant of adjoining rooms to use them as an auction room when the letting was not for a purpose which necessarily involved the nuisance so resulting: *Malzy v. Eichholz* [1916] 2 K. B. 308; 36 C. L. T. 709.

But, in order to constitute a breach of covenant for quiet enjoyment, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor, or those lawfully claiming under him, although neither the title to the land nor the possession thereof be otherwise affected. Where two lessees of adjoining land have a common lessor, and the lessee of one parcel does an act which he is not authorized by the lessor to do, it will not amount to a breach of covenant in the lease of the other parcel: *Sanderson v. Berwick-on-Tweed Corporation* [*ante*, p. 536].

There must be a disturbance; and a decree of the Court, not followed by any actual entry or disturbance, is no breach of a covenant for quiet enjoyment: *Howard v. Maitland* (1883), 11 Q. B. D. 695 [C. A.].

A covenant by a lessor for quiet enjoyment while the lessee pays rent and keeps the premises in repair is broken if the lessor serves notice on sublessees requiring them not to pay their rent to the lessee, but to the original lessor, and they act on such notice. In this case legal proceedings were threatened on default, and the lessor refused to withdraw the notice for several weeks, and he was held liable, though the lessee had not observed his covenant to pay rent or repair, the covenants being independent: *Edge v. Boileau* (1885) 16 Q. B. D. 117; 55 L. J. (Q. B.) 90.

Refusal of the landlord to make structural repairs to worn out water closets was held to be a breach in *Buttmer v. Bettz* (1914) 26 W. L. R. 705, 6 W. W. R. 22 [B. C.—Grant Co. C.J.], noted at 304, *ante*, and see the other cases there noted.

There was a demise of a mill and mill machinery, with a water privilege, the water power to be of the same extent as that enjoyed by the then lessee of the mill, and the lease contained a covenant for quiet enjoyment. The lessee was held entitled to damages sustained, it being shown that the water privilege to the extent provided for had not been actually enjoyed, in consequence of the wrongful acts of the lessor and his tenants: *Parker v. Fairbanks* (1874) 10 N. S. R. 215.

The Corporation of the City of Toronto leased the market fees of a wood market, established on one of the public highways of the city, covenanting against their own interference or that of any one by their license with the collection of said fees. Upwards of twenty years previously, they had passed a by-law recognizing, with certain restrictions, the right to deposit materials for building purposes on the highways of the city, and subsequently demised certain premises adjoining the market to one M., who obstructed a portion of the same with building materials. In an action against the city on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market, it was held that such action was not maintainable; that the by-law was one which the city had authority, with a view to public improvement and convenience, to pass, and that the lessee must be taken to have been cognizant of it when he became their tenant; that M. might without the license of the city have occupied a reasonable portion of the highway, the by-law apparently merely restricting without expressly conferring the right of occupation; that the market being fixed on a public highway, which is *prima facie* for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway, and that there was no such implied covenant as the lessee asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him: *Reynolds v. Corporation of Toronto* (1866) 15 U. C. C. P. 276.

See also *Lumbers v. The Gold Medal Manufacturing Co.* [p. 785, *post*] and *Gregory v. Tunstall* (1910) 15 W. L. R. 140 [B. C.—Murphy, J.].

### *Trespass and Eviction.*

Eviction has been defined and the various cases on the subject discussed at p. 297, *ante*.

The covenant for quiet enjoyment protects the lessee against all disturbances, whether wrongful or otherwise, by the lessor himself: *Lloyd v. Tomkies* (1787), 1 T. R. 671; *Andrews v. Paradise* (1724) 8 Mod. 318, or by his servants or agents, if acting under his authority: *Seaman v. Brownrigg* (1552) 1 Leon. 157.

But these acts of the lessor must be done in the assertion of a right as distinguished from a mere trespass. Thus to enter for the purpose of sporting is no breach: *Seddon v. Senate* (1810) 13 East 72.

And a purchaser of leased land who entered and ploughed the land before the expiration of the term and before harvest was held to be a trespasser. The lease provided for the incoming tenant entering after harvest: *Newell v. Magee* (1899) 30 Q. R. 550.

A sub-lessor consented to a judgment in an action of ejectment brought against him by his lessor although the landlord had no right of re-entry. It was held that this amounted to an eviction of his sub-lessee: *Cohen v. Tanner* [1900] 2 Q. B. 609 [C. A.].

Where the lessor in an under-lease covenants against any interruption by him, or any person lawfully claiming by, through, or under him, a recovery of possession by the owners of the reversion upon the original lease, on a condition of re-entry for non-payment of rent, will not constitute a breach of the lessor's covenant for quiet enjoyment in the under-lease, the interruption being the act of the superior landlord, not that of the sub-lessor, or any person claiming under him: *Stanley v. Hayes* (1842) 3 Q. B. 105, followed; *Kelly v. Rogers* [1892] 1 Q. B. 910; 61 L. J. (Q. B.) 604 [C. A.].

*When the Demised Premises are Expropriated.*

The Government of Canada, having taken certain land for the purposes of the Welland canal, paid into Court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, etc., and, on payment of the money, to convey free from all other incumbrances, including taxes. The lessee of the property so taken claimed compensation for disturbance. It was held that he was entitled thereto out of the money paid into Court, and that his claim was one which the owner was liable, under the 37 Vic. c. 13, s. 1 (D.), to pay, and which should have been taken into consideration: *Fitch v. McRae* (1881) 29 Grant 139.

*Diverting the Demised Premises to a Use not Contemplated.*

This has already appeared from what is said under Article 15, at p. 157, *ante*.

*Except in the Case of Restrictive Covenants.*

Leases of houses sometimes contain covenants preventing the lessee from carrying on or permitting or suffering the premises to be used for the purpose of obnoxious trades, or as a shop, or for any purpose except a private dwelling house, and leases of business premises sometimes contain covenants restricting the user of the premises in some particular way.

The covenants are implied in certain cases: see p. 158.

As to when such covenants are "usual covenants" see Article 16.

Covenants of this nature, prohibiting the use of the premises for business purposes or requiring a business to be conducted in a particular manner, run with the land so as to bind assigns: *Wilkinson v. Rogers* (1863), 2 De G. & S. 62; 12 W. R. 119, 284; 10 Jur. N. S. 5, 162; *Wilson v. Hart* (1866) 11 Jur. N. S. 735; L. R. 1 Ch. 463;

*Jay v. Richardson* (1862), 30 Beav. 563; and see Article 142.

In the case of houses the object is to prevent the lowering of the tenement in the scale of houses by the exercise, whether wholly or partially, of those trades which in the judgment of the lessor are likely to be a nuisance in the neighborhood, or to prevent tenants from afterwards taking the premises, and which by so doing may depreciate their value at a future period: *Doe d. Gaskell v. Spry* (1818) 1 B. & Ald. 617.

The Court refused to give damages for the alleged breach of a covenant by a lessee not to carry on any business offensive or annoying to the lessor or his assigns, since the business was not in itself offensive or annoying, another similar business being carried on in the same building as the leased premises without objection, a full disclosure of the nature of the business having been made by the lessee, and no tenants having brought action against the lessor or moved out of the premises: *Brown v. Toothills* (1914) 29 W. L. R. 729; 7 W. W. R. 318 [Man.—Metcalf, J.].

A lease under seal of certain premises for three months, contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and “gents’” furnishing store. The usual manner in which this business is carried on being by sales over the counter, it was held that the carrying on by the lessee of auction sales of his stock on the premises was a breach of the covenant restrainable by injunction: *Cockburn v. Quinn* (1890) 20 O. R. 519.

A lessor demised property for a term of years, the lessee “to do nothing to interfere with insurance.” The lessee made an under-lease omitting this stipulation, and the under-lessee commenced the business of rectifying highwines, the effect of which was to invalidate the insurance, and the agent of the insurance company notified the lessor to that effect. The Court restrained the parties from rectifying highwines or carrying on any other business that would interfere with the insurance: *Arnold v. White* (1856) 5 Grant 371.

Owners of land leased buildings thereon to a company which covenanted that it would not carry on any business in the nature of a nuisance or by which the insurance on the premises would be increased. Lessee subleased part of the premises to plaintiff with a clause permitting the erection of a fire-proof room to contain a "waste machine." The company assigned its lease and the reversion of the sub-lease to defendants. The insurance company objected to such erection as increasing danger, and cancelled the insurance. The lessors obtained an injunction restraining operation of the machine, thereby necessitating the renting of other land and the erection of a building thereon: *Middleton, J.*, held, on evidence, that an action to recover rent of this land, costs of building, and loss of business profits, failed, as no breach on part of the defendants had been shown: *Dominion Waste Co. v. Railway Equipment Co.* (1914) 26 O. W. R. 692; 6 O. W. N. 426.

But it is not a breach of a covenant against carrying on trade or business in a house to use it as a private lunatic asylum: *Doe v. Bird* (1834) 2 A. & E. 161; 4 H. & M. 285.

Under a covenant not to "use the premises as a public house or beer shop," the Court refused an injunction to restrain the user of the premises as a private hotel where the liquors were supplied only to visitors and no beer at all was sold on the premises: *Duke of Devonshire v. Simmons* (1894) 11 T. L. R. 52.

The lessee of a theatre bought an adjoining piece of ground which was subject to a covenant of which he had notice, that "the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer," should not be carried on there. He erected on this piece of ground a building, the object of which was to furnish convenient egress from the theatre, but on each floor he set up a counter for selling wine, spirits, and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre, when open for theatrical performances, could purchase refreshments, and it was held that this was a violation of the covenant:

*Buckle v. Fredericks* (1890) 44 Ch. D. 244; 62 L. T. 844 [C. A.]; followed in *Fitz v. Ilés* [1893] 1 Ch. 77; 2 R. 132 [C. A.].

A lessee covenanted not to erect or build on the demised premises, without the written consent of the lessor; "any other building whatsoever," save and except a stable and coachhouse; and also not to do on the demised premises any act, matter or thing which might be an annoyance or nuisance to any tenant of the lessor. The lessee, without the lessor's consent, erected above his boundary fence an open trellis-work screen of wood, about fifty-eight feet long and twelve feet high, which interfered to some extent with the light flowing to the ground floor windows of the adjoining premises, which were held on lease from the same lessor, with covenants similar to those above stated. In an action by the lessor against an assignee of the lease, it was held that the screen was a "building" within the meaning of the covenant, and that it was also an "annoyance," as it interfered with the pleasurable enjoyment of the adjoining premises, and the defendant was ordered to pull down the screen, and pay the costs: *Wood v. Cooper* [1894] 3 Ch. 671; 63 L. J. (Ch.) 845.

Reference may also be made to: *Day v. Waldron* (1919) 88 L. J. K. B. 937 [not to alter premises: to use as dwelling house only: alteration into flat]. *Miller v. Dott* (1920) 89 L. J. (Ch.) 15 [to maintain price of admission to theatre: not against increase]. *Litvinoff v. Kent* (1918) 34 T. L. R. 298 [not to annoy adjoining tenants—revolutionary propaganda]. *Prothero v. Bell* (1906) 22 T. L. R. 370; 26 Ch. T. 336 [not to use premises for immoral purposes]. *Dartford Brewery Co. v. Till* (1906) 22 T. L. R. 502; 26 C. L. T. 493; *Teape v. Douse* (1905) 21 T. L. R. 271; 25 C. L. T. 208 [binding on under-lessee]. *Lord Howard de Walden v. Barber* (1903) 19 T. L. R. 13; 23 C. L. T. 97; *Charrington & Co., Ltd. v. Camp* (1902) 18 T. L. R. 152; 22 C. L. T. 70; *Bickmore v. Dimmer* (1902) 18 T. L. R. 416; 22 C. L. T. 178; *Gedge v. Bartlett* (1901) 17 T. L. R. 43; 21 C. L. T. 58; *Arnold Perrett & Co., Ltd., v. Radford* (1901) 17 T. L. R. 301; 21 C.



L. T. 193. *Rudd v. Manahan* [*post*, p. 1077]; and articles in (1909) 29 C. L. T. 552, and (1890) 10 C. L. T. 1.

### WHEN THE COVENANT IS BROKEN.

ARTICLE 86.—A covenant for quiet enjoyment is not broken until there is an interruption or obstruction in the enjoyment during the term; but it is otherwise with a covenant for title, which is broken, if at all, as soon as made.

[Authorities: *Platt v. Grand Trunk Ry. Co.* (1886) 12 O. R. 119].

Any breach of the covenant must be during the term and not prior to its commencement: *Ireland v. Bircham* (1835) 2 Bing. N. C. 90.

A covenant for quiet enjoyment is prospective in its operation: *Cuthbert v. Street* (1859) 9 U. C. C. P. 115; that from the time of granting the lease the enjoyment of the premises shall not be obstructed by the lessor, or any one for whom he is responsible.

Where water pipes, which the lessor has provided before the tenancy, burst and do damage to the lessee, the lessor is not liable where there is no negligence on his part in fixing the pipes, and they are reasonably fit and proper for the purpose for which they are used: *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602; 49 L. J. Q. B. 708 [C. A.]. This subject is discussed at length at pp. 581 *et seq.* (*post*).

In *Wood v. Saunders* (1912) 21 W. L. R. 195; 3 D. L. R. 42 [Sask.], it was held that the quiet enjoyment clause did not protect the plaintiff against a termination of the lease under the provisions of the lease.

### THE REMEDY FOR A BREACH.

ARTICLE 87.—The remedy for breach of the covenant is an action for damages which will lie only if

the lessee cannot get, or is deprived of, that which the lease itself professes to grant.

[Authorities: *Leech v. Schweder* (1874) L. R. 9 Ch. App. 463.

The breach works no suspension of the rent: p. 304, *anté*.

If the measure of damages for breach of a covenant be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment: see *Hole v. Chard Union* [1894] 1 Ch. 293. Where there is no evidence as to actual damage, the plaintiff will be entitled to nominal damages. The damages are calculated up to the date of the issue of the writ, when there has been no eviction. Where there is an eviction, and the enjoyment is ended, the damages must be assessed once for all: *Child v. Stenning* (1877) 11 Ch. D. 82; 48 L. J. (Ch.) 392; 40 L. T. 302. [C. A.].

Moreover, he cannot recover damages for an infirmity in the title of his lessor, of which he knew at the time he entered into the contract: *Gaslight & Coke Co. v. Towse* (1887) 35 Ch. D. 519.

The measure of damages upon a breach of the covenant, where the cause of such breach is eviction of the lessee, is, in addition to the expense to which he has necessarily been put, the full value of what he has lost by being evicted, or the value of the term. Reference to *Williams v. Burrell* (1845) 1 C. B. 402; *Rolph v. Crouch* (1867) L. R. 3 Ex. 44; 37 L. J. (Ex.) 8; 17 L. T. R. 349; *Sunderland Athletic Association v. Toronto General Trust Corporation* (1919) 16 O. W. N. 293 [Logie, J.] who said "the plaintiffs might claim restoration of the premises, which had been wholly altered and their character changed, but by consent damages only were sought."

A lessor having entered into the usual covenant with the lessee for quiet enjoyment, an action of trespass was afterwards brought against the lessee by a person claiming under the lessor. The lessee gave notice of the action to his lessor, but the latter paid no attention to the

notice; and the lessee, acting on his own judgment, and without express authority, defended the action, and was obliged to pay damages and costs; and it was held that he was entitled to recover the same from the lessor with his own expenses: *Rolph v. Crouch, supra*, and see *Lock v. Furze* (1866) L. R. 1 C. P. 441.

It will not be assumed that a lessor intends to make himself liable for a breach of the covenant for quiet enjoyment, and if there is a doubt as to whether the lease include certain premises, which the lessor does not own, they will not pass, though not expressly reserved: *Morris v. Kemp* (1867) 13 Grant 487.

Under the covenant for quiet enjoyment, the lessee cannot call upon the lessor to defend him against an unfounded claim. Where there were two lessees having the same landlord, and the one whose lease was prior in date brought an action against the other to restrain him from obstructing light, it was held that the defendant could not add the lessor as a third party: *Scripture v. Reilly* (1891) 14 P. R. 249.

### RESTRAINING A BREACH.

ARTICLE 88.—A breach of the covenant for quiet enjoyment may be restrained by injunction and a mandatory injunction may be given, if necessary.

[Authorities: *Allport v. Securities Corporation* (1895) 64 L. J. Ch. 491].

*In Re Perram v. Town of Hanover* (1916) 36 O. L. R. 582 [Middleton, J.] the measure of damages was stated in a case where a municipal corporation which had leased to P. for three years a factory building with the right to use of water power expropriated the premises when the lease had yet a year to run.

## CHAPTER XI.

### REPAIRS—THE DUTY OF THE LANDLORD.

ARTICLE 89.—*Landlord's Liability in Absence of Agreement.*

ARTICLE 90.—*Landlord's Liability to Tenant for Letting Premises in Dangerous Condition.*

Where there is no contract to repair.

Where there is a contract to repair.

ARTICLE 91.—*No implied Warranty of Demised Premises.*  
The duty to disclose defects.  
Express warranty.

ARTICLE 92.—*Except in Case of Furnished House.*

As to condition at the commencement of the term.

The scope of the covenant.

The remedy of the tenant.

The rule in *Hamlyn v. Wood*.

ARTICLE 93.—*The Landlord's Liability in Respect to Entrances and Passageways.*

ARTICLE 94.—*Continued.*

ARTICLE 95.—*Landlord's Liability in Respect of Part of Premises not Demised in which there are Defects at the Time of the Demise.*

ARTICLE 96.—*The Landlord's Liability in Respect of Dangerous Substances Brought on the Demised Premises.*

The rule in *Rylands v. Fletcher*.

ARTICLE 97.—*The Landlord's Liability to Third Parties.*  
If premises ruinous when let.

If landlord has contracted to repair.

ARTICLE 98.—*The Landlord's Covenant to Repair and to put in Repair.*

ARTICLE 99.—*The Landlord's Liability and Tenants' Rights on Breach of the Landlord's Covenant to Repair.*

ARTICLE 100.—*And on Breach of the Landlord's Covenant to put in Repair.*

ARTICLE 101.—*The Landlord's Right to Enter to Repair.*

### ABSENCE OF AGREEMENT.

ARTICLE 89.—In the absence of express agreement a landlord is not, as between himself and his tenant, under any liability either to put the demised premises into repair at the commencement of the term or to repair during the continuance of the tenancy.

[Authorities: 18 Hals. s. 984; *Lane v. Cox* [1897] 1 Q. B. 415; *Cavalier v. Pope* [1906] A. C. 428; *Brown v. Toronto General Hospital* (1893) 23 O. R. 599; *Rogers v. Sorell* (1903) 14 M. R. 450 [C. A.]].

A lessor may, of course, bind himself by an express covenant to repair: *Bird v. Elwes* (1868) L. R. 3 Ex. 225; 37 L. J. (Ex.) 91, which should be contained in the lease or agreement, and the tenant should not rely on an oral promise made before the execution of the latter: *Tidey v. Mollett* (1864) 16 C. B. N. S. 298; 33 L. J. (C. P.) 235.

The fact that the premises become unfit for use does not entitle the tenant to quit or to refuse to pay rent: see p. 285, *ante*, and see Articles 99 and 100 as to failure by the landlord to repair when he has covenanted to do so.

Where there is no covenant by a landlord to repair, no action lies by the tenant against him for not repairing: *Brown v. Toronto Hospital* [*post* p. 568]; even where for want of repairs the tenement becomes uninhabitable; *Humphrey v. Wait* (1871) 22 U. C. C. P. 580.

The lessee of a road from a joint stock company cannot maintain any action against the latter for neglect to repair, causing a diminution of tolls in the absence of any covenant in the lease binding the lessors to repair: *Watson v. Sarnia P. R. Co.* (1858) 16 U. C. R. 228.

The owners of two houses in a street numbered 38 and 40, and of a gateway under 40 and adjoining 38, in 1857 demised the house No. 38 for a term of twenty-one

years, the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises. In 1865, they granted a lease to the plaintiff of the house No. 40 for a term of eleven years, subject to a similar covenant to repair walls and party walls. The wall on the side of the gateway separating it from No. 38 was a party wall, between the gateway and the house No. 38, to the height of the first floor. The house of the plaintiff, No. 40, was built so as to extend in part over the top of the gateway and to rest upon this party wall between the gateway and the house No. 38, and to be supported by it. The plaintiff's covenant to repair did not extend to this wall, and there was no covenant by the lessor to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which were above the gateway were giving way. The damage was owing to the failure of support from the party wall, which had bulged in consequence of the pressure upon it from the plaintiff's premises. It was held that there was no implied covenant on the part of the lessors to support the plaintiff's premises, although it might be an answer to an action on the plaintiff's covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of the defendants: *Colebeck v. Girdlers Co.* (1876) 1 Q. B. D. 234; 45 L. J. (Q. B.) 225.

#### PREMISES IN DANGEROUS CONDITION.

ARTICLE 90.—Fraud apart, a landlord who lets any premises—other than a furnished house—in a dangerous and unsafe condition incurs no liability to his tenant, to members of his tenant's family, or to customers or guests of the tenant for any accident which may happen to them during the term, unless [perhaps] he has contracted to keep the premises in repair.

[Authorities: *Robbins v. Jones* (1863) 15 C. B. (N. S.) 221; 33 L. J. (C. P.) 1; *Lane v. Cox* [1897] 1 Q. B. 415 [C. A.]].

“A landlord who lets a house in a dangerous state, is not liable to the tenant’s customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house and the tenant’s remedy is upon his contract, if any.” *Robbins v. Jones* (1863) 15 C. B. (N. S.) 221; 33 L. J. (C. P.) 1: Judgment delivered by Erle, C.J., but prepared by Willes, J.

The basis of this rule is that the condition of the premises is the subject of contract between the landlord and tenant: *Lane v. Cox* [1897] 1 Q. B. 415; 66 L. J. (Q. B.) 193 (Esher, M.R.).

The rule has been approved and followed in *Lane v. Cox* (*supra*); *Cavalier v. Pope* [1906] A. C. 428; 75 L. J. (K. B.) 609.

If there is no duty to a tenant there can be no duty to a stranger and a landlord was held not liable to a workman who, moving furniture in the demised premises for a tenant at the tenant’s request, was injured through the defective condition of a staircase: *Lane v. Cox* (*ante*).

The wife of a tenant cannot be in a better position to recover damages than a customer or a guest—her position is, perhaps, less favourable because of her peculiar knowledge of the state of the house: *Cavalier v. Pope* (*supra*). This case is not in conflict with *Miller v. Hancock*, *infra*, [p. 595], which was decided upon the basis of the “trap doctrine.”

A daughter of a tenant who had covenanted to repair was injured by the fall of a verandah attached to the demised premises. It was held she could not recover: *Mehr v. McNab* (1894) 24 O. R. 653 [Div. Ct.], noted at p. 569, *post*.

Unsuccessful attempts have been made to bring members of the tenant’s family or his employees within the scope of the rule laid down in *Nelson v. Liverpool Brewery Co.*, discussed in Article 97, p. 589, *post*, it being argued that they were strangers.

This was done in *Cavalier v. Pope* (*supra*)—wife; *Mehr v. McNab* (*supra*)—daughter; *Cameron v. Young* [1908] A. C. 176; 77 L. J. (P. C.) 68 [H. L.]—children

and wife; *Trainshi v. C. P. R.* [1918] 2 W. W. R. 1034 [B. C.—C. A.]—servant.

In *Cameron v. Young* (*supra*), Lord Robertson, at pp. 69-70 (77 L. J. P. C.), said:—

“The facts giving rise to the important question now before the House are of the simplest. The respondents let to one Robert Cameron, the husband and father of the appellants, a dwelling-house at Crieff. The house was allowed to get out of repair in the matter of drains; disease was generated owing to this neglect, and Cameron and his family, the appellants, suffered accordingly. Cameron’s own claim for damages was sued by him in this action; but he has been settled with, and is out of the case. The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord.

It seems to me perfectly clear that they have not; and I rest my opinion not alone on the authority of *Cavalier v. Pope* [*supra*], but on principles common to the laws of Scotland and of England, which *Cavalier v. Pope* applied. . . .

The argument for the appellants has indeed rested on invoking principles of the law of neighbors which have nothing to do with the rights of inhabitants of the house. Those principles are embodied in a distinct chapter of Scotch law, and are concerned with what may be called the *external or foreign relations* of the owner of a house. There he is liable, because the maxim *Sic utere tuo ut alienum non laedas* necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbor from his house. He must not allow his house to get into such disrepair that it falls down on his neighbor’s house or injures the passer-by in the street. In all those cases the person injured and claiming damages stands on his own rights; and his relation to the offending or negligent proprietor is not constituted or measured by any voluntary contract.

These principles have no application at all to persons who are within the house, for they have, and can have,



no right to be there except by the license of the owner, given by the owner, on certain terms, to the person with whom he chooses to contract. Nor can it be omitted from notice that, if the appellants' contention were sound, the liability of the landlord may be indefinitely increased or diminished according to the domestic or social relations or tastes of the tenant, over which the landlord has no control.

I have examined all the cases prior to *Cavalier v. Pope*, *supra*, which were cited at the Bar; and with one apparent but not real exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed."

In *McIntosh v. Wilson* (1913) 23 M. R. 653; 26 W. L. R. 95; 14 D. L. R. 671; 5 W. W. R. 644 (C. A.) a tenant of a suite of rooms in an apartment block was unable to recover for damages caused by the fall of a radiator, part of the fittings for steam heating in the demised premises, and the above rule was approved. The tenant argued unsuccessfully that the heating plant was under the control of the landlord and sought to apply *Miller v. Hancock*. The lease, however, contained an express provision exonerating the landlord in such cases. The covenant was merely to supply steam for heating and the radiator was part of the demised premises.

In *Trainshi v. Canadian Pacific Railway* [1918] 2 W. W. R. 1034 [B. C.] the Court of Appeal for British Columbia held that a landlord is not responsible for injuries resulting from the defective condition of an elevator upon premises in the possession of a tenant, even though from time to time he sent his engineer to repair it and although at the time of the demise, the elevator was out of repair or in a dangerous condition.

*Jones et al. v. Morton Co., Ltd.* (1907) 14 O. L. R. 402 [C. A.]. The lessors demised the third flat of a building together with right of entrance and also covenanted to give the use with the other tenants for freight purposes only of an elevator which they covenanted to keep in repair on notice and to keep in proper running

order. The lessors, however, were not to be liable for any damage or accident to the lessees or their employees. Through the negligence of the lessors the elevator was out of order and fell, injuring the infant plaintiff, an employee of the lessees. It was held there was no liability on the lessors—the effect of the provision relieving from liability being the same as if there were no agreement to repair (Meredith, J.A.): *Robbins v. Jones, Lane v. Cox*, applied. The plaintiff's rights as against the lessors depended upon invitation which was cancelled and withdrawn when he was told the elevator was out of order and he was forbidden to use it (Garrow, J.A.).

*Flynn v. Toronto Industrial Exhibition Association* (1905) 9 O. L. R. 582 [C. A.]. The defendants, lessees of a large "Exhibition Ground" by special agreement permitted part of the grounds to be used by an owner of a "merry-go-round." The plaintiff was injured while riding on the machine by reason of a defect in its construction. Held, that the special agreement was a license and not a lease; that the defendants were inviters who did not exercise their right of supervision and were liable.

*Marshall v. Industrial Exhibition Association* (1901) 1 O. L. R. 319 [Div. Ct.] 2 O. L. R. 62 [C. A.]. This was the case of a similar agreement. The licensee of a refreshment stand was injured owing to a defect in the floor of the building. It was held she was an invitee and could recover.

See also *Wood v. Hamilton*, noted at p. 587, and *Schmidt v. Berlin* (1894) 26 O. R. 54 [Div. Ct.], and *Thyken v. Excelsior* [1917] 2 W. W. R. 772; 11 Alta. L. R. 344; 34 D. L. R. 543.

It was held that a landlord who leases a house in a defective condition, and subsequently when the defendant tenant threatens to leave agrees to repair it but does not do so, is liable in damages to a tenant's wife in respect of injuries sustained by her owing to the defective condition of the house, she being a person lawfully upon the premises: *Cavalier v. Pope* (1905) 21 T. L. R. 544; 25 C. L. T. 384, but this was reversed in [1905] 2 K. B.

757; 21 T. L. R. 747; 25 C. L. T. 536, and the defendant was held not liable on the basis of breach of contract or duty to make the repairs or on the basis of the maintenance of premises in a dangerous condition so as to be a trap or nuisance, and that judgment was affirmed in the House of Lords [1906] A. C. 428; 22 T. L. R. 648; 26 C. L. T. 570.

D., the owner of an hotel, leased it to A. and later assented to an assignment of the lease to B. The lease was made subject to the Short Forms Act and contained A.'s covenant "to repair, except outside repairs." M. fell through an opening in the verandah floor and was injured. It was held that D. was not liable, there being no covenant on his part to repair; and even if there were, M., a stranger to it, could not recover: *Marcille v. Donnelly* (1910) 14 O. W. R. 1044; 30 C. L. T. 195; 1 O. W. N. 195.

M. was tenant of a house under a lease by which he covenanted to repair. He sub-let part of the house, and owing to want of repairs in part of a balcony the sub-lessee's wife was injured. It was held that, even assuming that the covenant to repair enured to the sub-lessee's benefit, M. was not liable because he had no knowledge or notice of the defective condition of the premises: *Tredway v. Mechin* (1904) 20 T. L. R. 726; 24 C. L. T. 331.

In *Love v. Machray* (1912) 22 M. R. 52, 1 W. W. R. 925; 20 W. L. R. 505 [C. A.—Ryan, Co. J.] the defendant was equitable owner of land under an agreement to purchase it. He held it in trust for certain parties who rented it to C. and C. was in possession. There was an uncovered well on the premises. C. agreed with the plaintiff for a consideration to allow the plaintiff to pasture horses on the land. One of these horses fell into the well and was injured so that he died. It was held, following *Lane v. Cox* and *Cavalier v. Pope*, that there was no common law liability on the defendant to keep the well covered. It was also held that a by-law of the rural municipality requiring the well to be kept covered cast no duty upon the owner in this case: the land was in pos-

session of the tenant and the landlord had no right to go upon the land for the purpose of covering the well or indeed for any purpose.

Perdue, J.A., said: "The defendant was not in control of the premises and had not undertaken to keep them in repair. The tenant . . . was the person, if any, on whom the responsibility rested, of keeping the well in question fenced or covered. If there was no duty owed by the defendant to the tenant . . . there was none due to a stranger."

### *The Effect of a Contract by the Lessor to Repair.*

The trend of the Ontario cases is against liability on the part of the landlord even where the agreement to repair is unlimited: see per Meredith, J.A., in *Jones v. Morton & Co.* (1907) 14 O. L. R. 402 [C. A.] at p. 413.

The English authorities are to the contrary and would probably require to be followed in the other provinces.

### *The English Cases.*

In *Lane v. Cox* [1897] 1 Q. B. 415 [C. A.] Lopes, L.J. says: "A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant or to customers or guests of the tenant, for any accident which may happen to them during the term, *unless he has contracted to keep the house in repair.*" In this case there was no contract to repair.

### *The Ontario Cases.*

*Brown v. Trustees of Toronto General Hospital* (1893) 23 O. R. 599 [Rose, J.—Div. Ct.].

Here a monthly tenant of a house notified his landlord that the front steps had become out of repair; the landlord promised to repair, but neglected to do so; the tenant continued to use the steps and was injured. It was held the tenant could not recover—the absence of authority supporting his claim was a grave difficulty in his way—he knew of the danger and chose to take the

risk, there being other doors—and he could have made the repairs and deducted the cost from his rent; as to this last see p. 315, *ante*. The report of this case does not disclose any express covenant to repair, though one seems to be assumed by Rose, J., p. 600, and Boyd, C., p. 603, also by counsel for the landlord in argument in *Mehr v. McNab* (1894) 24 O. R. 653 [Div. Ct.] at p. 654, where the covenant was by the lessee and it was held his daughter could not recover for injuries sustained when a verandah fell.

### NO IMPLIED WARRANTY.

ARTICLE 91.—Subject to the exceptions coming within the scope of the following article there is no implied covenant or warranty that demised premises are fit for the purpose for which they are intended to be used.

[Authorities: *Sutton v. Temple* (1843) 12 M. & W. 52; *Chappell v. Gregory* (1864) 34 Beav. 250; *Searle v. Laverick* (1874) L. R. 9 Q. B. 122; *Westropp v. Elligott* (1884) 9 A. C. 815; *Manchester Bonded Warehouse Co. v. Carr* (1880) 5 C. P. D. 507; *McIntosh v. Wilson*, *ante*, p. 565; *Telfer Bros. v. Fisher* (1910) 15 W. L. R. 400 [Alta.]; *Evans v. Templin* (1910) 13 W. L. R. 714.

“A man who takes a house from a lessor takes it as it stands; it is his business to make stipulations before hand”; *Chappell v. Gregory* (Romilly, M.R., p. 252); *Tarrabain v. Ferring* [1917] 2 W. W. R. 381—12 Alta. L. R. 47; 35 D. L. R. 632; [1918] 2 W. W. R. 172 [S. Ct. Can.—Alta.], holding also that where a landlord agree to erect a building which a tenant is to occupy besides the express agreement to build according to specifications there is an implied agreement to produce a building reasonably fit within the limitation of the specifications for the known purpose for which the tenant intended to use it; holding also that the tenants who went into possession had waived the right of repudiation the breach of such implied agreement had given them.

Reference may also be made to *McClure v. Little*, at p. 603, *post*.

This rule applies even when the premises are let for the specific purpose of a lodging or boarding house: *Gordon v. Sime* (1917) 44 N. B. R. 386; 37 D. L. R. 386 [App. Div.]; *Jones et al. v. Morton Co.* (*supra*).

### *The Duty to Disclose Defects.*

The United States Courts draw a distinction between defects which an ordinarily careful examination would reveal to the intending tenant and concealed defects which could only be known to the landlord and hold that there is a duty upon the landlord to disclose the latter.

"I do not find, however, that the distinction so drawn . . . has been recognized by the English authorities, which we are bound to follow": per Cameron, J.A., in *McIntosh v. Wilson* (1913) 23 M. R. 653 [C. A.] at p. 660; 26 W. L. R. 95; 14 D. L. R. 671, where the United States authorities are collected and considered.

A landlord who did not disclose defects which he must have known existed was deprived of his costs of a successful appeal, and of the tenant's action in *McIntosh v. Wilson* (*ante*).

### *Express Warranty.*

A collateral verbal warranty as to the condition of unfurnished houses may be enforced by a tenant in an action for damages.

*De La Salle v. Guilford* [1901] 2 K. B. 215; 84 L. T. 549; 21 C. L. T. 420; and see *McIntosh v. Wilson* (*ante*, p. 565), and *Bunn v. Harrison* (1886) 3 Times L. R. 146 [C. A.] 2 C. L. T. 420; *Evans v. Templin* (1910) 13 W. L. R. 714; *Telfer Bros. v. Fisher* (1910) 15 W. L. R. 400; 3 Alta. L. R.

## THE EXCEPTION.

ARTICLE 92.—There is a clear distinction between a furnished and unfurnished house. On letting a

furnished house there is an implied condition of law that the premises are in an habitable state at the commencement of the tenancy.

This principle or "artificial rule as distinguished from a general principle," as Masten, J., calls it in *Davey v. Christoff* (1915) 35 O. L. R. at p. 171, was first laid down in *Smith v. Marrable* (1843) 11 M. & W. 5. Baron Parke in this case based his decision upon two earlier authorities and as Meredith, C.J.O., points out in *Davey v. Christoff* (*post*), at p. 130, "would have decided in favor of the tenant even if the house had not been a furnished house." Lord Abinger, C.B., however, in the same case confined his decision to a furnished house, and, as Cameron, J.A., says in *McIntosh v. Wilson* (1913) 23 M. R. 653, at p. 658 (26 W. L. R. p. 95; 14 D. L. R. 671) that there was an implied condition was so obvious that no authorities were necessary on the point.

In *Sutton v. Temple* (1843) 12 M. & W. 52, the rule in *Smith v. Marrable* was (by the same Judge) confined to furnished houses. He said, "In such a case the contract is for a house and furniture *fit for immediate occupation*."

Meredith, C.J.O., said in *Davey v. Christoff* (1916) 36 O. L. R. 123, at p. 130: "It is difficult to understand the exact ground upon which the exception is based."

The learned author of 18 Hals. 569, in his note (a), points out that the ground upon which these cases were decided, namely, that the furniture was the greater part of the value which the party renting gives for the house and premises is "obviously incorrect," and that *Wilson v. Finch-Hatton* in (1877) 2 Ex. D. 336, founded the distinction which is "well-established" on the "ground of the intention of the parties to be inferred from the circumstances of the letting."

The rule has been followed in cases such as *Bird v. Lord Greville* (1884) Cab. & El. 317; *Harrison v. Malet* (1886) 3 T. L. R. 58; *Charsley v. Jones* (1889) 53 J. P. 280; 5 T. L. R. 412; *Campbell v. Wenlock* (1866) 4 F. & F.

716; *Gordon v. Goodwin* (1910) 20 O. L. R. 327; 15 O. W. R. 215; 30 Occ. N. 451.

In *Davey v. Christoff* (1916) 36 O. L. R. 123; 28 D. L. R. 447, affirming 35 O. L. R. 162, it was held following *Smith v. Marrable* and *Wilson v. Finch-Hatton* that the rule applied in the case of a demise of a moving-picture theatre including seats, machinery and equipment.

Attempts have been made to apply the rule to cases where unfurnished suites of apartments have been let; in those cases although no chattels are mentioned in the lease, the apartments are usually fitted with blinds, a refrigerator and sometimes a stove or range. It has been held, however, that in such cases there is no implied warranty: *St. George Mansions, Ltd. v. Hetherington* (1918) 42 O. L. R. 10; 13 O. W. N. 367; 41 D. L. R. 614; and see *McIntosh v. Wilson*, *ante*, p. 565.

The language of Abinger, C.B., in *Sutton v. Temple* (*supra*), particularly at p. 60, in which he lays stress upon the importance of the house being ready for immediate and temporary occupation—to which attention is paid in the succeeding cases *e.g.*, *Hart v. Windsor* (1843) 12 M. & W. 68—and his suggestion that if the tenant had an opportunity of inspecting before entering has led to the question arising as to whether the rule applies where the house is taken for a long term, *e.g.*, five years. See *Chester v. Powell*, *Powell v. Chester* (1885) 52 L. T. 722, and *Bunn v. Harrison* (1886) 3 T. L. R. 146, referred to by Cameron, J.A., in *McIntosh v. Wilson*, *supra*; 23 M. R. at p. 659, and by Meredith, C.J.O., in *Davey v. Christoff*, *supra*, at p. 129.

#### *At the Commencement of the Tenancy.*

The warranty is as to the condition of the premises at the commencement of the term; there is no warranty that they will continue fit for habitation: *Sarsons v. Roberts* [1895] 2 Q. B. 295; *Wilson v. Finch-Hatton* (*supra*); *Gordon v. Goodwin* (*supra*).

#### *The Scope of the Covenant.*

“The house must be reasonably fit for habitation at the beginning of the term. . . Of course, there is no



need for the tenement to answer every whim of a finical tenant; but common sense should be applied in determining whether it does fulfil the required conditions": per Riddell, J., in *Gordon v. Goodwin* (1910) 20 O. L. R. 327 [Div. Ct.]; a case of defective sewerage and plumbing which rendered the premises unsanitary and allowed the tenant to throw them up.

A landlord was held liable in damages where he had leased premises to a tenant knowing them to be totally unfit for the purpose for which they were built and for which the tenant required them, notwithstanding that the unfitness was caused by defects in the city's sewer, because the landlord knew of that condition at the time the lease was made and he withheld that information from the tenant: *Miles v. Constable* (1914) 26 O. W. R. 351; 6 O. W. N. 362; [Kelly, J.]; (1916) 27 O. W. R. 222; 7 O. W. N. 125, 344.

#### *The Remedy of the Tenant.*

The tenant can throw up the premises if the nuisance is of so serious a nature that no person can reasonably be expected to live in them: *Smith v. Marrable* (1843) 11 M. & W. 5, per Parke, B.: *Davey v. Christoff* (*ante*), per Meredith, C.J.O., at p. 125.

As to recovery of damages for illness caused by an unsanitary house: see *Gordon v. Goodwin* (1910) 20 O. L. R. 327, at p. 331.

#### *The Lessor's Situation.*

The landlord has not the right to correct the defects after the tenancy has commenced or to call upon the tenant to repair: *Wilson v. Finch-Hatton* and *Smith v. Marrable*; *Gordon v. Goodwin* (where there was a covenant to repair).

Nor can he recover rent under the lease nor for use and occupation: *Smith v. Marrable* (*supra*).

#### *The Broader Principle.*

This expression is used by Masten, J., in *Davey v. Christoff* (1915) 35 O. L. R., at p. 171.

There is a right to imply a stipulation in a written contract where "on considering the terms of the contract in a reasonable and businesslike manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

*Hamlyn & Co. v. Wood & Co.* [1891] 2 Q. B. 488 (Esher, M.R.); and see the similar language used by the same Judge in *Exp. Ford* (1885) 16 Q. B. D. 305; *Lamb v. Evans* [1893] 1 Ch. 218 (Bowen, L.J.).

The plaintiff in *Brymer v. Thompson* (1915) 34 O. L. R. 194, rented through an agent the top flat of a building—the flats of which were listed as "steam heated." It was the intention of the parties that the demised premises should be heated by the landlord, but the lease was silent as to heating. Steam heat was supplied, but inadequately owing to insufficient operation, and the plaintiff who was using the flat as a factory suffered loss. In an action for damages Middleton, J., applied the above principles and gave judgment for the plaintiff, saying, (p. 196): "I think there was here an implied promise and contract on the part of the landlord that the premises leased should be adequately and sufficiently heated; and furthermore, I think that there is nothing in the fact that the case is one between landlord and tenant to render the law upon which I am acting inapplicable: *De La Salle v. Guilford* [1901] 2 K. B. 215, determines that a tenant can sue upon a collateral verbal warranty, and puts an end to the suggestion in earlier cases that there can be no suit on a warranty unless it is in the lease: *a fortiori*, there can be an action upon a collateral contract such as this." This view was affirmed on appeal 34 O. L. R. 543 [App. Div.] and Meredith, C.J.O., was also of the opinion that a case had been made for the rectification of the lease so as to include the covenant on the part of the lessor that the premises should be steam-heated during the whole of the term.

It should be noted that Masten, J., rested his decision in *Davey v. Christoff*, 35 O. L. R. 162 (p. 572) not only on the rule in *Smith v. Marrable*, but upon the above broader principle, while Meredith, C.J.O., at p. 130 (36

O. L. R.) held that the case came within the rule in *Smith v. Marrable* and that *Hamlyn & Co. v. Wood & Co.*, did not apply.

The application of this rule is also dealt with at pp. 158 *et seq.*

### ENTRANCES AND PASSAGEWAYS.

ARTICLE 93.—If the landlord permits access to the demised premises through entrances or over passages or stairways retained in his possession and control, the extent of his liability is that he is bound not to create a trap or concealed danger. In other words the means of access must be what it appears to be; if he provides a stairway it must be a proper stairway—one defective step renders it an improper stairway (*Miller v. Hancock*)—if he provides a balustrade it must be sufficient to withstand reasonable pressure.

[Authorities: *Infra, Passim*].

In *Miller v. Hancock* [1893] 2 Q. B. 177, the Court of Appeal held that there was by necessary implication an agreement by the landlord with the tenant to keep the staircase in repair. This case is considered in *Dobson v. Horsley* [1915] 1 K. B. 634; 84 L. J. (K. B.) 399, also a decision of the Court of Appeal where Buckley, L.J., points out that the basis of the decision was in the application of the trap doctrine, saying p. 639: "The fact that there was a defective stair was a fact which the persons using the staircase were not bound to anticipate. The contrary was the case. By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there."

The fact that a door is heavy and unwieldy with a stiff spring does not constitute a trap: *Erickson v. Traders Building Association, Ltd.* (1916) 9 W. W. R. 989; 33 W. L. R. 372; 27 M. R. 209; [1917] 1 W. W. R. 272

[C. A.] even when combined with the presence of ice on the pavement, part of the premises (*ibid.*): there being no liability on the landlord to remove from the steps used in common by the tenants the ice and snow which naturally accumulated thereon.

In *Dunster v. Hollis* (1919) 88 L. J. (K. B.) 331 [1918] 2 K. B. 795 [Lush, J.] held that the duty of a landlord who lets rooms in a building to a tenant and keeps under his own control the steps which form the common approach to the building is not an absolute one of ensuring that the steps are in a safe condition, but his obligation is wider than merely safeguarding the tenant from risks of a concealed trap: *Miller v. Hancock* (*supra*) considered; *Hart v. Rogers* (1915) 85 L. J. (K. B.) 273; [1916] 1 K. B. 646, not followed.

In *Wallich v. Great West Construction Co.* (1914) 6 W. W. R. 1404; 29 W. L. R. 41 [Man.—Macdonald, J.] the plaintiff was on her way to visit a tenant of a basement flat in an apartment block owned by the defendant. In traversing the dark hall way she fell into an open trap-door-way—left open by an employee of a plumbing contractor who was doing some repairs. Held, that the defendants were liable for the injuries sustained.

This subject is discussed in an article in (1909) 29 C. L. T. pp. 380 *et seq.* and see also 29 C. L. T. at p. 295.

## ENTRANCES AND PASSAGEWAYS.

ARTICLE 94.—If, however, the means of access is what it actually appears to be and there is no trap or concealed danger, then although the means of access may be hazardous—a loft approached by a ladder, a cellar approached by steep steps, a tenement approached by a plank—the landlord is not liable to a person accepting the invitation to use means so provided.

[Authorities: *Lucy v. Bawden* [1914] 2 K. B. 318; 83 L. J. (K. B.) 523 (Atkin, J.); failure to provide a railing for steps does not constitute a trap].

There is no trap in an unlighted staircase and a landlord is not bound to light it: *Huggett v. Miers* [1908] 2 K. B. 278; 77 L. J. (K. B.) 710; nor in the failure to provide a hand rail or railing for an approach; *Dobson v. Horsley* [ante, p. 575], 35 C. L. T. 422; *Hart v. Rogers* [1916] 1 K. B. 646; 85 L. J. (K. B.) 273 (Scrutton, J.).

*Humphrey v. Wait* (1871) 22 U. C. C. P. 580, is to the same effect; the defect was plain and obvious and existed when the demise was made. It was a case where the owner of a house leased a room in it, the only mode of access to which and to the other rooms in the same storey was by a certain passage in which there was an uncovered stove pipe hole. The lessee, having agreed with the lessor to change into an adjoining room, was in the act of moving her furniture when she slipped into this hole and was injured; and it was held that the lessor was not liable, this being a mere non-feasance, he having done nothing to derogate from his own grant: See *Rogers v. Sorell*, p. 579, where this decision is distinguished from *Miller v. Hancock*.

See also *Brown v. Toronto General Hospital*, noted at p. 568, ante.

Even where under the terms of a lease there is an implied obligation on the landlord to keep the staircases in the rented building in repair, he is not also necessarily bound to keep them lighted (per Cayley, C.C.J., [applying *Huggett v. Miers* [1908] 2 K. B. 278; 77 L. J. (K. B.) 710, and distinguishing *Miller v. Hancock* [1893] 2 Q. B. 177; 69 L. T. 214], affirmed by the Court of Appeal. A city by-law providing that "The owner of any theatre . . . office building, or any public building requiring fire escapes, shall provide the same with indicating lights at all fire escapes, and shall at all times adequately light all lobbies, halls and corridors . . .," held to be intended to provide protection to tenants and occupants of such building in case of fire, and, therefore, not one which could be invoked in an action for personal injuries resulting from falling down an unlighted stairway. The plaintiff was a member of a club which rented the fourth

floor of an office building of which the defendant had become the owner under foreclosure proceedings. At 8.30 in the evening the plaintiff left the club rooms and rang for the elevator. It not coming, he walked down the stairway. The stairways and corridors were under control of the defendant, and were at the time, lighted only upon the third and fourth floors, so that after leaving the third floor the plaintiff found himself in darkness, and, not knowing that at the mezzanine floor there was a change in the direction of the stairway, fell down the flight of steps leading to the ground floor and was injured. In an action for damages, Cayley, C.C.J., applying *Huggett v. Miers* [1908] 2 K. B. 278; 77 L. J. (K. B.) 710, nonsuited the plaintiff and an appeal was dismissed: *McKinlay v. Mutual Life Assurance Co. of Canada* [1919] 3 W. W. R. 1001; 25 B. C. R. 5; 43 D. L. R. 259.

Where a certain part of a building is leased and a license given to the tenant to use other parts of the building the tenant takes the premises as he finds them. But the grantor of the license will be liable for injuries sustained by reason of the subsequent creation wilfully or negligently and without warning of a new danger: *Ivay v. Hedges* (1882) 9 Q. B. D. 80. A tenant who with others had the privilege of drying clothes upon the roof and who slipped, falling against a railing on its outer edge, which was out of repair to the knowledge of the landlord, was held not entitled to recover for injuries caused when the rail gave way and he fell into the courtyard.

This case was discussed in *Thyken v. Excelsior Life Assurance Co.* [1917] 2 W. W. R. 772 [Alta.—App. Div.]. The male plaintiff rented several rooms in a building and his wife, the female plaintiff, using the fire escape attached to the outer wall of another part of the building for the purpose of hanging out clothes, was injured by falling through an unguarded hole in the floor of the fire escape which gave access to a ladder descending to the ground. The question turned on the answer of the jury as to whether the female plaintiff was justified in believing that she was entitled or invited to use the plat-

form for that purpose. The jury answered that by "general use" she was so entitled or invited. The Appellate Division (Beck, J., dissenting), held that at the best on the evidence she was a bare licensee and must take the premises as she found them, and the landlord was not liable: *Ivay v. Hedges* applied. The opening was not a trap (Stuart and Walsh, J.J.). Beck, J., thought the landlord was liable on the principle of *Miller v. Hancock*, ante, p. 575].

In *Powell v. Thorndike* (1910) 102 L. T. 600, the landlord although not bound to do so, supplied a lift for carrying goods delivered by tradesmen: *Miller v. Hancock* was held not to apply and the landlord was held not liable for an accident due to the nature of the lift itself—nor would he be liable for an accident due to mismanagement when he did not retain the control of it: *Matthieson v. Pollock* [1910] S. C. 11. See also *Steer v. St. James Prudential Chambers Co.* (1887) 3 T. L. R. 500.

### PARTS NOT DEMISED.

ARTICLE 95.—Where a landlord retains possession or control of a part of premises, other parts of which he demises and there are, at the time of the demise in the parts so retained, defects likely to result in damage to the tenant and such damage subsequently results, the landlord is not liable unless he has contracted to remove the defect.

[Authorities: *Rogers v. Sorell* (1903) 14 M. R. 450 [Ct. en B.—Killam, C.J.]: *Barker v. Ferguson* (1908) 16 O. L. R. 252; 11 O. W. R. 257 [Div. Ct.].

A tenant taking part of a building in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such as are apparent at least: *Rogers v. Sorell* (*supra*), holding that the tenant of a store on the ground floor could not recover for injury to goods caused by water entering an unglazed fanlight over a door in the floor above, the water flowing over the floor above the plain-

tiff's store came through the ceiling causing the plaster to fall and damaged the goods of the tenant: *Miller v. Hancock* [*ante*, p. 575], distinguished.

The same rule was applied in *Barker v. Ferguson* (*supra*), where a landlord was held not liable for damage from water percolating through a defective roof two stories above the flat occupied by the plaintiff: *Rogers v. Sorell* (*supra*), was specially referred to and followed. Boyd, C., pointed out the great dearth of English authority and he quoted the dicta of Kelly, C.B., and Martin, B., in *Carstairs v. Taylor* (1871) L. R. 6 Ex. 217, at pp. 219, 222; 40 L. J. (Ex.) 129.

"The duty of the landlord in such a case (one of an under flat) cannot rest upon any implied covenant. . . . The duty of the owner is simply *sic utero tuo ut alienum non laedas*, which maxim as Serjeant William says . . . does not apply to omissions, but almost always applies to some act which is done by one man to the prejudice of another": *Betcher v. Hagell* (1905) 38 N. S. R. 517; 1 E. L. R. 20; 26 C. L. T. 420 [Ct. en Banc], followed in *Barker v. Ferguson* (*supra*).

In these cases there was an attempt to apply *Miller v. Hancock* [*ante*, p. 575]. That case was distinguished in *Rogers v. Sorell* on the ground that the defect in *Miller v. Hancock* arose after the date of the lease.

And see *Hart v. Rogers* [1916] 1 K. B. 646, discussed at p. 583, *post*.

There was a lease of the ground floor of a building, the upper part of which was occupied by the lessor. The rain water which fell upon the roof was conducted to the cellar, and thence to a public drain by a pipe extending perpendicularly to the basement from a box sunk into the roof. During an unusually heavy rainstorm, the pipe proving insufficient to carry off the water, it backed up and leaked down through the building and damaged the lessee's goods. The jury found that there was no negligence in the mode adopted for carrying off the water or in the construction of the pipe; and it was held that as the water was not collected on the roof and conveyed into the drain for the benefit of the lessor alone,



but also for the benefit of the lessee, the former was not liable for the injury to the goods: *Tennant v. Hall* (1888) 27 N. B. R. 499.

In a similar case the water from the roof was collected by gutters into a box from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the lessee's goods. The lessor had used reasonable care in examining and seeing to the security of the gutters and the box; and it was held that he was not liable either on the ground of an implied contract or on the ground that he had brought the water to the place from which it entered the warehouse: *Carstairs v. Taylor* (1871) L. R. 6 Ex. 217; 40 L. J. (Ex.) 129.

### ESCAPING SUBSTANCES.

ARTICLE 96.—Where a landlord, with the consent of and for the partial benefit of his tenant, maintains on or brings on to premises—part of which he has demised—anything likely to do damage if it escapes, and it does escape, he is only liable *if the tenant can show the landlord was negligent*.

[Authorities: *Powley v. Mickleborough* (1910) 21 O. L. R. 556 (Div. Ct.); *Hess v. Greenway* (1919) 45 O. L. R. 650; *Stewart, etc., Co., Ltd. v. Jackson* (1913) 4 W. W. R. 1216 (B. C.)].

Article 106 deals with the liability of a tenant who permits dangerous substances to escape on to the premises of another tenant. The rule expressed in Article 96 is one of the exceptions to the rule in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, which is: "The occupier of land, who brings upon it anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, *even if he has been guilty of no negligence*."

The rule and its exceptions are discussed by Dr. Silas Alward in (1911) 31 C. L. T. 557, where he gives the above exception as Number 2 and says, p. 559, "It

usually finds its application in the storeys of a building in the occupancy of different tenants, where water escapes from an upper storey. In like cases the water is brought upon the premises for the mutual benefit of the different occupants and with their express or implied consent"; and he refers to *Carstairs v. Taylor* (1871) L. R. 6 Ex. 217; 40 L. J. (Ex.) 129; *Tennant v. Hall* (1888) 27 N. B. R. 499, and *Hargroves, Aronson & Co. v. Hartopp et al.* [1905] 1 K. B. 472.

The Appellate Division of Ontario, on appeal from Latchford, J., 15 O. W. N. 109, considered the same rule and exception in *Hess v. Greenway* (1919) 45 O. L. R. 650; 48 D. L. R. 630; 16 O. W. N. 300. The facts were, as the head note shows:—

"Part of a building was let by the defendant E. to the defendant G., and another part to the defendant company. The plaintiff was sub-tenant of G. of part of the part of which G. was tenant. By the terms of the lease to G., E. agreed to heat the 'premises during all lawful working days to a reasonable extent, but will not be responsible for damages. . . if the parties under contract with the lessor to heat said building fail to do so, until he shall have reasonable notice . . .' By the terms of the lease to the company, it was to heat the building. The plaintiff's sublease contained a provision that heat would be furnished as specified in the lease to G. All the parties knew of the terms of the lease to the company, and that the heating of the building and the heating appliances were to be under the control and management of the company, subject to the right of E. to take over the heating in certain events. The action was brought to recover damages for the loss sustained by the plaintiff owing to the bursting of a steam-pipe, part of the heating apparatus of the building, in the room occupied by him."

Meredith, C.J.O., who delivered the judgment of the Court, said, at p. 662:

"Before dealing with the question of negligence as applied to the circumstances of the case at bar, I will state shortly the reasons why I do not think that the duty

of the respondent Elliott—which for the present I will assume he owed to the appellant—was an absolute one, *but only a duty not to be guilty of negligence.*

“Counsel for the appellant relied upon the judgment of Scrutton, J., in *Hart v. Rogers* [1916] 1 K. B. 646, 85 L. J. (K. B.) 273; 36 C. L. T. 396, but I prefer the reasoning and decision of Lush, J., in *Dunster v. Hollis* [1918] 2 K. B. 795, and it is to be observed that the question in *Hart v. Rogers* was an entirely different one from that presented for consideration in the case at bar. In that case the landlords let to a tenant a flat on the top-floor of a building, but retained possession and entire control of the roof. Water found its way into the flat through cracks in the roof, and what was held was that the landlords were bound to repair the roof, and that they did not discharge that obligation by showing that they took reasonable care to keep it in repair.

“In the case at bar, the heating plant, to the knowledge and with the assent of the appellant, was not being managed by the landlord, but by the respondent, the Sinclair & Valentine Company, and it was the means by which heat was to be supplied to the premises occupied by the appellant and the respondent Greenway, and the plant was, therefore, being operated for their benefit as well as that of the landlord. Nor is it a case to which the maxim *sic utere tuo* applies.”

And at p. 663, he said:

“If the principle of the decision of the House of Lords in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, is applicable to the case at bar, it may be that we are bound to hold that the duty of the respondent Elliott was an absolute one, and that he is answerable for the consequences of the bursting of the pipes.

“In some of the Courts of the neighbouring States, the view is taken that the principle is so broadly stated that it is applicable where a man has brought on his land for the purpose of his business something necessary for carrying it on, which is neither in itself nor in its operation a nuisance, but which without negligence causes injury to another; but these Courts have declined to apply the principle to such cases.”

He then discussed a number of United States cases and continued:

“It is satisfactory to know that the English Courts have not pressed the doctrine of *Rylands v. Fletcher* as far as in the view of those American Courts it logically extends, and that at all events it is not to be applied to such a case as this, where the thing which causes the injury is not operated solely for the benefit of the owner of it, but for the benefit of the person who suffers the injury as well as of the owner.”

“Such a case was *Carstairs v. Taylor* (1871) L. R. 6 Ex. 217; 40 L. J. (Ex) 129.” He then referred to *Ross v. Fedden* (1872) L. R. 7 Q. B. 661, and further said, at p. 666: “*Rylands v. Fletcher*, which was relied on by the plaintiff’s counsel, was distinguished, and the proposition of counsel ‘that the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper storey, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril,’ was negatived. It was also held that the maxim *sic utere tuo ut alienum non laedas* did not apply.”

“The distinction between cases of occupiers of adjacent lands and cases of occupants of separate storeys in the same house, established by these two cases, was recognized in *Humphreys v. Cousins* (1877) 2 C. P. D. 239, 246, and the principle of the decision in *Carstairs v. Taylor* was applied by the Court of Appeal in *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602, in which case it was held that, as the water which escaped was stored in a cistern for the benefit of the plaintiffs as well as of the other tenants, the doctrine laid down in *Rylands v. Fletcher* did not apply. The same principle was applied in *Blake v. Wolf* [1898] 2 Q. B. 426. I refer also to *Gill v. Edouin* (1894-5) 71 L. T. R. 762; 72 L. T. R. 579. It was also recognized by a Divisional Court in *Powley v. Mickleborough* (1910) 21 O. L. R. 556; see also *Childs v. Lissaman* (1904) 23 N. Z. L. R. 945, where the cases are collected and dealt with, which was referred to with approval in *Powley v. Mickleborough*.”

“It is also to be observed that, as Wright, J., pointed out in *Gill v. Edouin* (1894-5) 71 L. T. R. at p. 763, the doctrine established by *Rylands v. Fletcher* is subject to several qualifications, one of which is that, ‘where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies.’ ”

After which he discussed the question of warranty, as to which see pp. 569 and 574.

*Imperial Tobacco Co., Ltd. v. Hart* (1917) 51 N. S. R. 397; 36 D. L. R. 63 [Full Ct.] was an action by one adjoining owner against another for damages caused by escaping water.

There was a lease of a shop, the upper portion of which was occupied by other tenants. It having become necessary to make certain repairs to the roof, a portion was removed at the lessor’s instance without notice to the lessee. Owing to the negligent manner in which the work was done, rain fell into the building and ran through and injured the latter’s goods. It was held that the work was done by the lessor at his own risk, and that he was responsible for the injuries sustained in consequence of the damage to the goods: *Engley v. McIlreith* (1873) 9 N. S. R. 511.

In a lease of a shop the landlord covenanted to heat the premises to a certain temperature. The existing plant failed to do this, and the landlord employed an independent contractor to instal an additional radiator in the premises. The radiator was installed and the steam turned into it at the request of the caretaker during the tenant’s absence. The pipes were not fitted and escaping steam injured the tenant’s goods. It was held the landlord was liable for the negligent act of his caretaker in allowing steam to be turned on without ascertaining whether the radiator was in condition to receive it; that he was not relieved by employing an independent contractor, and that the contractor was also liable: *Malcolm v. McNichol* (1905) 2 W. L. R. 515 [Man.—Dubuc, C.J.], affirmed (1906) 16 M. R. 411; 5 W. L. R.

45 [C. A.], affirmed with variation; *McNichol v. Malcolm* (1907) 39 S. C. R. 265; 27 C. L. T. 664.

Reference should be made to *Malone v. Laskey* [1907] 2 K. B. 141; 23 T. L. R. 399; 27 C. L. T. 368, where the wife of a company manager who lived in premises leased by the company as sub-lessees was not allowed to recover against the owners for injuries caused by the fall of a fixture insecurely fastened by workmen sent to repair it. The owner was under no obligation to repair.

The same rule was laid down by Murphy, J., in *Stewart, McDonald & Thomson, Ltd. v. Jackson & Co.* in (1913) 4 W. W. R. 1216 (B. C.), where lessees of part of a building who were entitled to use lavatories in another part over which the landlord retained control were not allowed to recover for damage to their goods caused by frost bursting a pipe in one of the lavatories. It was held that *Rylands v. Fletcher* did not apply; that there was no contract upon which an action could be based, following *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602; 49 L. J. Q. B. 708 (see as to contract the argument in *Hess v. Greenway*, *supra*, at p. 582), and there was not sufficient evidence of negligence: *Blake v. Woolf* [1898] 2 Q. B. 426; 67 L. J. (Q. B.) 813; 79 L. T. 188; 62 J. P. 659, followed.

The landlord was held to be guilty of negligence in *Hargroves, Aronson & Co. v. Hartopp* [1905] 1 K. B. 472; 21 T. L. R. 226; 25 C. L. T. 208. The plaintiffs who were tenants of a floor in a building suffered injury to their goods by reason of water from a stopped-up rain-water gutter in the roof, possession and control of which was retained by the defendant landlord, running down into the plaintiffs' premises. The landlord had notice of the stoppage but neglected to repair for four or five days during which the damage occurred. The plaintiffs recovered.

In *Sievert v. Brookfield* (1904) 35 S. C. R. 494 [reversing 37 N. S. R. 115, ordering a new trial] an overholding tenant of part of a shop recovered damages against a contractor employed to tear down other portions of the building, whose workmen left a tap running

so that the tenant's premises were flooded and his stock of tobacco damaged: *Davies and Nesbitt, JJ.*, dissented.

In *Brown v. Garson* (1913) 42 N. B. R. 354, a landlord who leased part of his building to various tenants was held liable for damage caused by the bursting of sewer pipes over which he retained control.

And a similar result was arrived at in an Alberta case where leaking water injured the property of the tenants: *Alberta Loan and Investment Co. v. Borcuson* (1915) 21 D. L. R. 385.

*Wolff v. MacKay* (1913) 12 D. L. R. 750, was another case where the landlord was held liable, the damage being caused by a leaking water tank maintained on the roof for the benefit of the tenants.

In *Wood v. City of Hamilton* (1912) 28 O. L. R. 214; 4 O. W. N. 805; 12 D. L. R. 451 [App. Div.]; 23 O. W. R. 627; 4 O. W. N. 427; 8 D. L. R. 824, a huckster who renewed her occupation of a leaky market-stall was held not entitled to recover for injury to her health because the injury was caused by her own act in renewing each week after she knew of its unsanitary condition: *Hargroves, Aronson & Co. v. Hartopp* (*supra*), and *Lax v. Corporation of Darlington* (1879) 5 Ex. D. 28, distinguished. In the *Wood Case* the question as to whether the plaintiff was a lessee or licensee was discussed and *Flynn v. Toronto Industrial Exhibition Association* [noted at p. 566] and *Marshall v. Industrial Exhibition Association of Toronto* [also noted at p. 566] were considered and followed.

The above article and cases should be considered with reference to Articles 91 and 92 and cases there noted as to warranty of premises and see *Hess v. Greenway* (*supra*), at p. 582, per Meredith, C.J.O.

### *Rylands v. Fletcher Applied.*

The principle of *Rylands v. Fletcher* was applied in the Manitoba case of *Skubiniuk v. Hartmann* (1914) 24 M. R. 836; 28 W. L. R. 518; 29 W. L. R. 765; 6 W. W. R. 1133; 7 W. W. R. 392; 20 D. L. R. 323; 35 C. L. T. 175.

[C. A.]. The owner of a tenement block employed a contractor to destroy the vermin with which the premises were infested. He knew that the contractor would use a poisonous gas of highly dangerous quality. The contractor placed various placards and took various precautions to prevent any accident while the work was in progress; but in spite of these efforts the plaintiff's husband, who acted as caretaker of the baths in the basement of the tenement, was killed through the accidental escape of the gas. It was held that as the owner had brought the dangerous substance to his premises, he kept it there at his peril, and was *prima facie* answerable for all damage which was the natural consequence of its escape. He could not shelter himself behind the liability of the contractor, for the contractor was employed to perform a dangerous work in the very performance of which the accident had happened.

### *Nuisance as Between Landlord and Tenant.*

A landlord let a farm to a tenant retaining in his own possession adjoining land on which was a shrubbery containing yew trees so near the farm as to overhang the boundary. A mare owned by the tenant ate branches of the trees and died. The tenant sued for damages, but did not prove that the yew trees overhung the boundary *at the time of the injury to the mare* to any greater extent than they had done at the date of the demise. In the Divisional Court Rowlatt, J., held that the plaintiff could not recover, while Coleridge, J., held he could [1917] 2 K. B. 516; 37 C. L. T. 727. The Court of Appeal [*Cheater v. Cater* [1918] 1 K. B. 247; 38 C. L. T. 351] affirmed Rowlatt, J., Bankes, L.J., saying—

“I accept fully the statement of Mellish, L.J., in *Erskine v. Adeane* (1873) L. R. 8 Ch. 761, which is in accordance with a long line of cases. He said, ‘the law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is *caveat emptor*, so in the case of taking a lease of property



the rule is *caveat lessee*; he must take the property as he finds it.' In the present case the plaintiff was unable to prove that there was any essential difference between the condition of the yew trees at the date of the demise and at the date when the mare ate of the branches. No attempt was made to show that there was any such difference. Upon that ground the plaintiff fails. It is, therefore, not necessary to consider the interesting question whether, if that had been proved, namely, that a condition of safety existed at the date of the demise and a condition of danger arose afterwards, the defendant would be liable."

But the judgment of Lord Coleridge, J., in Divisional Court should be considered on this latter point.

Bankes, L.J., pointed out that the encroachment was not a trespass but a nuisance, and that the relation of landlord and tenant gives rise to different considerations to those in the case of ordinary adjoining owners.

There is no implied obligation on the part of the lessor to keep up the fences of closes which he retains in his own hands and which abut upon land demised to a tenant so as to prevent the tenant's cattle from straying on to them: *Erskine v. Adeane* (1873) L. R. 8 Ch. 756.

In the *Elite Café, Ltd. v. City of Regina* [1919] 1 W. R. 308; 12 Sask. L. R. 161; [1919] 2 W. W. R. 120 [C. A.] the municipal corporation was held liable to a tenant of a building for damages to his goods caused by flooding from a break in the water service pipe with which the city had supplied water to a building formerly on the land. The pipe had never been used during the existing tenancy, but the water had never been turned off.

## LIABILITY TO THIRD PARTIES.

ARTICLE 97.—Where premises are in such a condition as to be dangerous to adjoining owners or *passers-by* and particular damage results to such persons, the landlord is liable: (1) if the premises were

in such a ruinous condition *when let* as to be a nuisance; (2) if the landlord has so contracted to repair that the tenant can sue him for not repairing; in all other cases the tenant is liable.

[Authorities: *Nelson v. Liverpool Brewery Co.* (1887) 2 C. P. D. 311; 46 L. J. (C. P.) 675].

Article 105 expressing the liability of the tenant in such cases is the converse of this Article. It appears at p. 655, *post*.

*“The External or Foreign Relations of the Owner of a House.”*

These words are used by Lord Robertson in *Cameron v. Young* [1908] A. C. 176; 77 L. J. P. C. 68 [H. L.].

In *Nelson v. Liverpool Brewery* (*supra*), Lopes, J., said at p. 676 (46 L. J. C. P. 675): “We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger, by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable—first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; *secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition.* In either of these cases we think an action would lie against the owner: see *Payne v. Rogers* (1794) 2 H. Bl. 350; 3 R. R. 415; *Todd v. Flight* (1860) 9 C. B. (N. S.) 377; 30 L. J. (C. P.) 21; *Russell v. Shenton* (1842) 3 Q. B. 449; 11 L. J. Q. B. 289; and *Pretty v. Bickmore* (1873) L. R. 8 C. P. 401; 28 L. T. 704.

It has been attempted to apply the analogy of these cases where there is no public nuisance but merely a defect in the interior of the premises, but the attempt has failed: see p. 563, *ante*.

“This rule is based upon the maxim *sic utere tuo ut alienum non laedas*. The person injured stands on his own rights and his relation to the offending or negligent proprietor is not constituted or measured by any volun-

tary contract": (Lord Robertson) in *Cameron v. Young* [1908] A. C. 176.

If a house abut on the highway the owner must repair all known defects of the house and its appurtenances, the non-repair of which may result in danger to the passer-by, and that duty is not discharged by the employment of a contractor to repair such defects. If damage results from the negligence of the contractor so employed, the householder is liable: *Tarry v. Ashton* (1876) 1 Q. B. D. 314; 45 L. J. (Q. B.) 260; 34 L. T. 97.

*Premises in Ruinous Condition When Let.*

The defendant, O'Grady, in *Organ v. City of Toronto* (1893) 24 O. R. 318 [MacMahon, J.—C. P. D.], was owner of an hotel building, upon which was a conduit pipe running from the roof to the ground which discharged water on to the sidewalk. In this condition he leased the hotel to his co-defendant O'Donohue. While the lessee was in possession the water froze on the sidewalk and the plaintiff slipped upon it and was injured. A municipal by-law required the occupier to remove the ice. It was held that O'Grady was, but O'Donohue was not liable over to the municipality for the damages recovered: *Gandy v. Jubber* (*post*, p. 594), and *Todd v. Flight* (*supra*), referred to.

Reference should also be made to *Hett v. Janzen*, noted at p. 593, *post*, and to *Gwinnell v. Eamer* (1875) L. R. 10 C. P. at p. 661, where Brett, J., said, "If the landlord at the time of the demise knows of the defect, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether if the burden of repair is cast upon the tenant, the duty of the landlord does not altogether cease." See also *Pretty v. Bickmore* (1873) L. R. 8 C. P. 401, and per Boyd, C., in *Hett v. Janzen*, at p. 418 of 22 O. R.

If a *nuisance* exist at the time of the letting, both tenant and owner are liable to conviction therefor. If it arise after the tenancy is created, the tenant only is responsible, but an agent merely to let or receive rents is

not liable in either case: *R. v. Osler* (1872) 32 U. C. R. 324.

A landlord who lets premises for a fixed and definite purpose is liable for any nuisance that arises naturally and of necessity from the use of such premises as contemplated by the demise: *Harris v. James* (1876) 45 L. J. (Q. B.) 545; 35 L. T. 240.

The assignee of a term having the management and disposition of the property is liable for a nuisance arising to an adjoining owner from the defective drainage of the premises, though he would not be liable for a nuisance arising wholly from the use made by his tenants of the premises, but he is liable when the nuisance does not arise from any act of the tenant's: *Foster v. Cameron* (1860) 19 U. C. R. 224.

But if the owner of land erect a building which is a nuisance, and let the land, he is liable to an indictment for such nuisance being continued during the term: *Todd v. Flight* (1860) 9 C. B. N. S. 377; 30 L. J. (C. P.) 21.

If a person buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such purchaser re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance both civilly and criminally: *R. v. Pedley* (1834) 1 A. & E. 822.

The owner of land, in which were a mill-dam and two mills, leased each of the mills to a separate tenant, who by means of the dam penned back the water on the plaintiff's land, and it was held that the lessor was liable for the injury thus occasioned: *Breathour v. Bolster* (1864) 23 U. C. R. 317.

### *Premises Becoming Ruinous During Term.*

The premises in question were leased for five years, the lessee covenanting to repair. Long before the date of the lease a grating had been put in the sidewalk for the purpose of admitting light into the building. Before

the expiration of the term J. purchased the building. The grating became out of repair before the expiration of the term. The tenants held over as yearly tenants. The plaintiff shortly after fell through the grating. It was held J. was not liable. The plaintiff argued that the premises were ruinous at the time of the "new letting." Boyd, C., said (p. 418): "There is no evidence that the fact of the grating being broken was made known to, or was known by, the landlord in or before the moment of time which separated the end of the five years' tenancy and the beginning of the yearly tenancy which followed." And see this case noted at p. 594: *Hett v. Janzen* (1892) 22 O. R. 414 [Chy. Div.]; *Gandy v. Jubber* and *Nelson v. Liverpool Brewery Co.* (*ante*, p. 590), applied.

In *MacPherson v. Vancouver* (1912) 1 W. W. R. 114, 2 D. L. R. 283, 17 B. C. R. 264 [C.A.], the landlord escaped liability on the ground that the municipal corporation which had caused a grating in a board sidewalk to be taken up and set in a cement sidewalk had done so without any request by the landlord and the work was negligently done.

In *Dugas v. City of St. Catharines* (1920) 17 O. W. N. 361 [Falconbridge, C.J.K.B.] this case was distinguished and recovery over against the landlord allowed as he had had the grating put in. The landlord brought in his tenant as a third party. The tenant had formerly held under a lease in which he covenanted to repair but was a monthly tenant at the time. It was held that it would be unreasonable that such a term should be held applicable to a monthly tenancy following a prior lease.

S. was injured through a defect in the condition of a coal plate in the pavement in front of a house let on a weekly tenancy, and such defect, though not shown to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident, and its existence at the commencement of the tenancy might be inferred, and it was held that the reversioner was liable: *Sandford v. Clarke* (1888) 21 Q. B. D.

398; 57 L. J. (Q. B.) 507. This case was explained in *Bowen v. Anderson* (*post*).

A weekly tenancy does not determine without notice at the end of each week, but some notice is required to **determine** such tenancy, and as the owner of property is only liable for the consequences of the defective state of repair of the property if it is defective when let by him, the mere continuance of the tenant's occupation on the expiration of each week will not render the owner liable for defects then existing as on a re-letting: *Bowen v. Anderson* [1894] 1 Q. B. 164.

In *Anticknap v. City of St. Catharines* (1920) 47 O. L. R. 462; 53 D. L. R. 503 [App. Div.], it was held that the landlord was not liable either at common law or under s.464 (1) (2) of the Ontario Municipal Act, R. S. O. 1914 c. 192, for damage sustained by a pedestrian falling through a defective grating when the defect occurred after the letting. The tenant also who had covenanted to repair was held not liable on the ground that he was under no duty and had no power to repair the highway: [see *Horridge v. Mackinson* (1915) 84 L. J. (N.S.) (K.B.) 1294], and had not been guilty of any actionable negligence.

Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, the landlord, if ignorant of a defect arising from non-repair during the currency of the original lease, and continuing during the subsequent tenancy, is not liable to a stranger for an injury caused by such neglect happening during such subsequent tenancy, because the lessee's covenant to repair is continued by implication: *Hett v. Janzen* (1892) 22 O. R. 414; and there is no reletting, for where there is a tenancy from year to year, the landlord by merely omitting to give a notice to quit does not make himself liable for the dangerous state of the premises as on a reletting: *Gandy v. Jubber* (1864) 9 B. & S. 15; 33 L. J. (Q. B.) 151. Where the damage was from the non-repair of the trap-door over a cellar, and it appeared that it was the duty of the lessor to do this repair, as between him and the lessee, it

was held that the action lay against the lessor: *Payne v. Rogers* (1794) 2 H. Blac. 349. Where a house was let to a tenant who had gone out of it in order that repairs might be done, the landlord who had taken upon himself to order the repairs, and superintend them, though they were to be paid for by the tenant, was held liable for an injury done to a third person by reason of the cellar-flap having been negligently left open: *Leslie v. Pounds* (1812) 4 Taunt. 649. Where landlords volunteered to repair a well, which during such repairs was destroyed by the negligence of the workmen employed, it was held that it was a question for the jury, "what was the nature of the obligation incurred by the landlords by reason for their interference": *Mills v. Holton* (1857) 2 H. & N. 14.

But where the defendant, who was the owner of a building and a stack of chimneys near to a building of the plaintiff, demised them when the chimneys were known by him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they afterwards fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature; it was held that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall: *Todd v. Flight* (1860) 9 C. B. N. S. 377; 30 L. J. (C. P.) 21; *Gandy v. Jubber* (*supra*).

#### *If the Landlord has Contracted to Repair.*

"The weight of authority shows, I think, that the landlord must *know* of the ruinous or dangerous condition of his premises so as to be guilty of the wrongful non-repair which led to the damage": per Boyd, C., in *Hett v. Janzen* (*ante*), at p. 418 of 22 O. R.

The principle is thus put by Collins, M.R., in *Cavalier v. Pope*, *ante*, p. 566.

"It remains to be considered whether the claim of the female plaintiff can be supported on any other ground.

The learned Judge has based his decision in her favour on the authority of those cases of which *Nelson v. Liverpool Brewery Co.* [*supra*] is a type, which establish that, where premises are in such a condition as to be dangerous to passers-by, and particular damage results to a person so passing, an action lies against the person who is charged with the duty of keeping the premises in repair. These cases rest on the principle that the person who has control of the premises is liable for the consequences of a nuisance; and though that person is *prima facie* to be found in the occupier, he may rebut that presumption by showing that, in effect, the control has been passed to another person, who has contracted to be responsible for the repairs. Whether the ground on which the liability has been thus cast upon the person responsible for the repairs is, as suggested by Mr. Justice Heath in *Payne v. Rogers* [*supra*], avoidance of circuity of action, or the broader ground that the liability should rest on the person who, in fact, has the control, the liability has never in any decided case that I am aware of been placed on any one who was not deemed to have control. In all these cases there was a duty arising as Lord Esher, M.R., puts it, from 'proximity'—*Lane v. Cox* [1897] 1 Q. B. 415; 66 L. J. Q. B. 193; and *Le Lievre v. Gould* [1893] 1 Q. B. 491; 62 L. J. Q. B. 353. They are, in fact, cases of nuisance adjoining places of passage or public highways. Can the analogy of these cases be applied where there is no public nuisance, but merely a defect in the interior of the house, and an injury resulting therefrom to a member of the tenant's family? I think not. To hold otherwise would be to ignore the principle which limits the liability of occupiers towards licensees and guests to what has been described as setting a trap. If the view adopted by Mr. Justice Phillimore was sound, it would only be necessary for such persons to prove that they had sustained damage from the dangerous condition of the premises and that the person they sued was liable to repair them. But this is certainly not the law. Therefore, even if the defendant had by the contract of demise taken upon himself the burden of



keeping the premises in repair, I cannot see how his liability could be higher than that of an invitor; and inasmuch as the condition of the floor at the time of the accident was probably better known to the plaintiff than to the lessor, including his agent, the '*trap*' element is quite out of the case."

It is also clear that the landlord is liable where he has expressly licensed the tenant to do acts amounting to a nuisance: *White v. Jameson* (1874) L. R. 18 Eq. 303; see also *Harris v. James* [*ante*, p. 592].

Where a tenant covenants to repair, and during the term an accident happens to a third person from the want of repair, the landlord will not be liable where he had no knowledge of the defect, or means of knowing it, and is guilty of no negligence in being ignorant of it: *Gwinnell v. Eamer* (1875) L. R. 10 C. P. 658; 32 L. T. 835.

The person in possession who has covenanted to repair is in such case liable: the lessor is not, where he has done no act authorizing the continuance of the dangerous state of the premises, and the fact that he exacts a covenant to repair from the lessee shows his intention to have the premises kept in repair: *Pretty v. Bickmore* (1873) L. R. 8 C. P. 401; 28 L. T. 704.

## COVENANTS TO REPAIR.

ARTICLE 98.—A covenant by a lessor to *keep in repair* means a covenant to repair on notice; it is otherwise when the covenant is to *put in repair*; notice of the want of repair would not be necessary to the lessor in the latter case.

[Authorities: *Makin v. Watkinson* (1870) L. R. 6 Ex. 25; *Coward v. Gregory* (1866) L. R. 2 C. P. 153; *Neale v. Ratcliffe* (1850) 15 Q. B. 916].

### *Keep in Repair.*

The reason of the rule is that the lessor has no right to enter to see what repairs are required, though it

applies with more force to the interior than to the exterior of the premises: see per Boyd, C., in *Hett v. Janzen*, noted at p. 593, *ante*.

In an action by a tenant against a landlord for breach of an agreement to keep drains in repair where neither party knew of the defective condition of the drains before the damage occurred, but the tenant had not and the landlord had the means of knowing, it was held that there was no liability in the absence of notice: *Hugall v. McLean* (1885) 53 L. T. 94; 33 W. R. 588 [C. A.].

It has been held that the rule that the landlord is not liable unless he has been given express notice does not apply where only a portion of the premises has been demised and the landlord retains in his control the portion whose defective condition causes the damage, *e.g.*, the roof: *Melles & Co. v. Holme* [1918] 2 K. B. 100; 38 C. L. T. 590.

#### BREACH OF COVENANTS TO REPAIR.

ARTICLE 99.—Where a landlord agrees to keep in repair and fails to do so after notice, the tenant's only remedy—in the absence of express agreement—is an action for damages; he cannot execute the repairs and deduct the expense from the rent; he cannot go out of possession nor is the landlord's failure a defence to an action for the rent.

[Authorities: *Vancouver Breweries, Ltd. v. Dana* (1915) 52 S. C. R. 134; 21 B. C. R. 19; *Surplice v. Farnsworth* (*post*)].

##### *After Notice.*

See Article 98.

##### *Deducting from Rent.*

This question is discussed under Article 42, at p. 285, *ante*.

##### *Going out of Possession.*

If the landlord is bound to do repairs there is no implied condition that if not done the tenant may quit:

*Surplice v. Farnsworth* (1844) 7 M. & G. 576. If the latter desire such privilege he should have inserted a stipulation to that effect in the lease: *Furnivall v. Grove* (1860) 8 C. B. N. S. 496.

*Action for Rent.*

Where the landlord has entered into a contract to repair, compliance with the contract is not a condition precedent to his suing for rent in arrear. The tenant's remedy in such case is by an action on the contract itself and not by throwing up possession: *Surplice v. Farnsworth* (*supra*); see also *Ferguson v. Troop* (1890) 17 S. C. R. 527 [noted at p. 297], and the cases noted under Articles 41, p. 285, and 42, p. 305, *ante*.

The defendant, having distrained for rent in arrear, the plaintiff, in an action for damages for a breach of a covenant to repair and for illegal distress, alleged that there was no fixed rent due from him to the defendant because he had never been put in complete possession of the whole of the demised premises, and also because the defendant had failed to make the repairs he had agreed to make. The defendant denied the breach of covenant and counterclaimed for the balance of rent due over the amount received as the proceeds of the sale of the goods distrained.—Held, on appeal, affirming the judgment of Barry, J., that the plaintiff, having gone into possession under the lease, could not set up the failure to make the repairs agreed upon, or set up a trespass by the landlord even to the extent of depriving the tenant of the enjoyment of a portion of the demised premises unaccompanied by any intention to evict and put an end to the tenancy as an answer to the claim for rent. The issue on the claim for damages for breach of the covenant to repair having been found for the plaintiff, and the issues on the illegal distress and counterclaim for rent for the defendant, the costs in the cause should be taxed and allowed the plaintiff on the issue in his favor as if it were a separate action with no counterclaim; the latter (as though they were part of the costs of a separate action), should

be taxed to the defendant and added to the verdict on the counterclaim, the smaller to be deducted from the larger and the party in whose favor is the balance to have judgment for that amount: *Atlas Metal Co. v. Miller* [1898] 2 Q. B. 500, followed: *Gordon v. Sime* (1917) 44 N. B. R. 535; 37 D. L. R. 386.

*The Lessor's Covenant to Repair or Keep in Repair.*

It has already appeared [p. 568, *ante*], that an express contract between a landlord and his tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair.

Where a lessor is under a liability to maintain a wall, and non-performance may result in damages to a third person, he cannot, by leasing the premises and binding the lessee to perform the obligation, get rid of liability. The conjunction of a high wind and tide will not be an act of God excusing the maintenance of a graving dock: *Burt v. Victoria Graving Dock Company, Ltd.* (1882) 47 L. T. 378.

The owners of land through which a stream of water flowed, and across which they had built a dam connecting with a natural bank or point of land which formed part of the dam, leased the land adjoining below the dam to A. and his assigns, and covenanted to maintain and keep the dam in good repair at all times during the term, provided that if the supply of water should be cut off by the destruction or injury of the dam the rent should be suspended. The bank was broken by an extraordinary flood, which overflowed and injured A.'s mill to such an extent that it could not be repaired until after the lessor had restored the breach in the dam; and it was held that the covenant to repair only extended to the dam and not to the natural bank, that even if it did extend to the natural bank, the accident was no breach of the covenant if the lessor repaired the dam within a reasonable time; and, even if there was a breach of covenant, A. was not

entitled to recover for the destruction of his property and suspension of his business as damages resulting from such breach; though, on proof of negligence in an action on the case, it might be different: *Phillips v. St. John Water Co.* (1858) 9 N. B. R. 24.

A lease contained the usual covenant by the lessee to repair fences, but the lessor agreed "to build the line fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of the lease." The evidence showed that there was no line fence between the farms, but that there was a fence on D. M.'s land about twenty-four yards south of the boundary line. The lessee alleged that this fence was out of order, and that the lessor would not repair it, and that in consequence damage had been done to his crops by cattle. It was held that no liability could accrue under the lessor's covenant to build the line fence until something occurred to disturb the state of things existing at the time the lease was made, and that the covenant was designed to meet such a contingency as D. M. refusing to allow entry on his land to repair the fence or his requiring a proper line fence to be built. The language of the covenant being indefinite evidence was properly admitted to explain it: *Houston v. McLaren* (1887) 14 A. R. 103.

#### *The Covenant Runs with the Land.*

When a lessor has covenanted to repair, even granting that such covenant runs with the land, it will not bind a person who is not assignee of the reversion for any term or time, but only assignee of the rent for the term which the lessee is enjoying, for the covenant cannot run with rent: *McDougall v. Ridout* (1851) 9 U. C. R. 239.

Where the action for breach of covenant to repair was against the assignee of the term, the lease being made with the lessee, "his executors and assigns," and the evidence showed that the premises had been allowed to go to decay for want of necessary repairs, that up to the time the lessee assigned and left the premises they were in reasonable repair, but that after that and whilst

in the assignee's possession proper repairs had not been made; this was held evidence for the jury of a breach of covenant by the assignees whilst owners of the lease, and that the lessors were not bound to prove more and give express evidence of the actual state of the premises when the lease was made: *Perry v. Bank of Upper Canada* (1866) 16 U. C. C. P. 404.

This question is discussed at length at p. 1073, *post*.

### BREACH OF COVENANT TO PUT IN REPAIR.

ARTICLE 100.—Where a lessor agrees to *put in repair* and fails to do so the tenant's position is the same; in addition the tenant's covenant to repair may be suspended.

[Authorities: *Infra; Passim*].

The tenant's position is the same as defined in Article 99.

Where the lessor covenants to put the premises into repair, and the lessee to keep them so until the lessor has fulfilled his covenant, no liability to repair is cast upon the tenant by his covenant: *Coward v. Gregory* (1866) L. R. 2 C. P. 153.

#### *The Lessor's Covenant to Put in Repair.*

A general covenant by a lessor to put a wharf into good and sufficient repair on or before a given day will not be controlled or modified by a memorandum signed by the parties purporting to specify the work required to put the wharf in repair, where such memorandum is signed by the lessee without examining the wharf and on the lessor's representation that it was all right. And it seems that nothing short of an agreement that certain specified repairs should be a full performance of the covenant would suffice. In this case the wharf afterwards gave way in consequence of a latent defect, not specified or known to the lessee when the memorandum was signed: *Snarr v. Beard* (1871) 21 U. C. C. P. 473.

A lessor agreed to put the demised premises into good tenantable repair, and he executed repairs knowing that the lessee wanted the premises for the business of a silk and linen merchant. The lessee, after inspecting the premises, entered into possession, making no complaint as to repairs. Owing to the insufficient thickness of the outer wall it gave way by reason of the weight of goods stored therein. The lessee claimed damages to his business sustained while the lessor was repairing the broken wall; but it was held that the lessor's contract was clearly performed at the time the lessee took possession, and that if the latter required any extra support for his goods he should have called the lessor's attention thereto whilst the repairs were going on and before he took possession: *McClure v. Little* (1868) 19 L. T. 287.

And see *Tarrabain v. Ferring*, noted at p. 569, *ante*.

Longley, J., in an action for damages for breach of a covenant by defendant, the landlord of certain premises occupied by plaintiff, to put them into tenantable repair, entered judgment for plaintiff for \$1,000 damages upon the finding of the jury. On appeal it was held that a finding of breach of covenant by defendant was hardly warranted by evidence and damages were excessive: *Sutcliffe v. Bennett* (1914) 14 E. L. R. 128 [N. S.—Full Ct.]. Only noted in 16 D. L. R. 884.

### *Conditions Precedent.*

But where a lessee covenanted to repair, having or taking in and upon the premises competent and sufficient material for the doing thereof without committing any waste or spoil, the covenant to repair was held absolute with a license to the lessee to take sufficient material, and that the finding thereof was not a condition precedent to the liability of the lessee to repair: *Bristol v. Jones* (1859) 1 E. & E. 484.

Where the lessee covenants to put and keep the premises in repair, "being allowed rough timber, but not on the stem on the demised premises, the timber to be fetched and carried away at the expense of the

lessee"; it is sufficient if the lessor be ready and willing to allow and provide the rough timber, and he need not actually furnish it: *Martyn v. Clue* (1852) 18 Q. B. 661.

A lessee covenanted that he should at all times during the term repair and glaze the windows, and also the hedges, etc., when necessary, "the premises being previously put in repair and kept in repair by the lessor," and this was held an absolute and independent covenant by the lessor to put the premises in repair: *Cannock v. Jones* (1849) 3 Exch. 233; see also *Jones v. Cannock* (1852) 3 H. L. Cas. 700; 5 Exch. 713.

Where the lessee covenants to repair the premises, "the same being first put into repair by the lessor," repair by the latter is a condition precedent to the liability of the lessee; and the lessor is not entitled to recover for the non-repair of any part of the premises without having first repaired the whole: *Neale v. Ratcliffe* (1850) 15 Q. B. 916; 20 L. J. (Q. B.) 130.

Where a lessee covenanted to repair a house before the 1st of June (5,000 slates being found by the lessor towards the repair), and afterwards to keep in repair during the term, it was held that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting in repair before the 1st of June: *Mucklestone v. Thomas* (1739) Willes, 146.

Where a lessee covenants to complete buildings "under the direction and to the satisfaction of the surveyor" of the lessor, the appointment of such surveyor is a condition precedent to the performance by the lessee of his covenant to complete the buildings: *Hunt v. Bishop* (1853) 8 Exch. 675.

A tenant agreed to keep buildings in good repair, and the landlord by a subsequent clause agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing and labour. A barn requiring repairs, the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in consequence of which a storm damaged the roof and the rain



entered and damaged the tenant's grain; it was held that the latter was not entitled to damages for injury to the grain, for his obligation to repair was not conditional on the landlord finding materials, and the damage arose from his own failure to carry out his part of the contract, and he ought to have repaired and claimed the cost of the materials from the landlord: *Tucker v. Linger* (1883) 21 Ch. D. 18; 8 A. C. 508; 52 L. J. (Ch.) 941. See also *Jones v. Joseph* (1918) 87 L. J. (K. B.) 510; *Henman v. Berliner* [1918] 2 K. B. 236; 87 L. J. (K. B.) 984.

### ENTRY TO REPAIR.

ARTICLE 101.—If the landlord has covenanted to repair he may enter upon the premises for the purpose even though he has covenanted for quiet enjoyment, but if he has not so covenanted he may not enter to repair without the tenant's consent unless the right to do so is reserved to him in the lease.

[Authorities: *Saner v. Bilton* (1878) 7 Ch. D. 815; 47 L. J. (Ch.) 267; *Barker v. Barker* (1829) 3 C. & P. 557].

In the absence of permission from the lessee there should be a stipulation in the lease giving the lessor the right to enter for the purpose of making repairs: *Barker v. Barker* (*supra*); *Ferguson v. Troop* (1890) 17 S. C. R. 527.

But where a lessor had covenanted to keep the main walls and timbers of a building in good repair, it was held that there was an implied license to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs: *Saner v. Bilton*, *supra*; *Manchester B. W. Co., Ltd. v. Carr* (1880) 5 Ch. D. 507.

A lessor cannot enter on the demised premises in order to repair without leave, even though the breach of covenant by the tenant to repair be clear, and the landlord be liable to forfeiture under a superior lease and have leave from sub-tenants to enter. By doing so he commits a trespass which will be restrained by injunc-

tion: *Stocker v. Planet Building Society* (1879) 27 W. R. 877 [C. A.].

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after, except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent, whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. The jury did not find an eviction, but found that no consent had been given by the lessee for such occupation, and that the lessee had no beneficial use of the premises while it lasted. A majority of the Court held that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises and the lessor having entered upon the premises within the prescribed period had a reasonable time to complete the work, and his subsequent occupation was not wrongful or an eviction: *Ferguson v. Troop* (1890) 17 S. C. R. 527; 25 N. B. R. 440; 28 N. B. R. 301.

The covenant for quiet enjoyment is discussed at p. 536, *ante*.

## CHAPTER XII.

### REPAIRS AND USER—THE TENANT'S DUTY.

ARTICLE 102.—*The Tenant's Duty in Absence of Agreement.*

Tenant-like user.

Agricultural property.

Express covenant as to cultivation and user.

Waste.

Covenants to insure.

Covenants to repair.

ARTICLE 103.—*Commencement of Liability on the Covenant.*

ARTICLE 104.—*Remedies for Breach of Covenant.*

ARTICLE 105.—*Tenant's Liability to Passers-by.*

ARTICLE 106.—*Tenant's Liability for Dangerous Substances Escaping.*

### ABSENCE OF AGREEMENT.

ARTICLE 102.—As between landlord and tenant, apart from statute and in the absence of express agreement on the part of the tenant to repair, there is no liability on the part of the tenant to put or keep the demised premises in repair; there is however an implied covenant by the tenant to treat the premises in a tenant-like manner, and in the case of agricultural property to cultivate in an husband-like manner in accordance with the custom of the country, and [generally] a tenant may not commit waste.

[Authorities Article 15: *Lane v. Cox* [1897] 1 Q. B. 415.]

The right of a tenant to repair and deduct the cost from the rent has already been discussed: Article 42, p. 315, *ante*.

*The Express Agreement.*

This part of the Article is considered at p. 630, *post*.

*Apart from Statute.*

See p. 162 [*ante*] where the statutory implied covenants are discussed.

*Tenant-like User.*

Restrictions on the user of the premises are dealt with at p. 553, *ante*.

It has already been seen [p. 155, *ante*] that in the absence of an express covenant on the subject, a covenant is implied on the part of the lessee that he will use the buildings in a tenant-like and proper manner: and see *Harnett v. Maitland* (1847) 16 M. & W. 257; *Yellowly v. Gower* (1855) 11 Exch. 294.

The provisions of the Noxious Weeds Act are important: R. S. M. 1913 c. 145; (1907) 7 Edw. VII. c. 15 [Alberta]; (1912-13) 2-3 Geo. V. c. 39 [Sask.].

*Agricultural Property.*

The implied covenant is to cultivate in an husband-like manner in accordance with the custom of the country, p. 157, *ante*.

See *Dunsford v. Webster* (1903) 23 C. L. T. 290; 14 M. R. 529; 2 E. & E. Dig. 13, 20; noted at p. 161.

A custom must be interpreted by the approved and well recognized method in a given locality which fixes the rule by long continued usage: see *Re Watson's Trusts* (1891) 21 O. R. 528; *Dashwood v. Magniac* [1891] 3 Ch. 367.

Where a custom of the country is proved to exist, it will be considered applicable to all tenancies in whatever

way created, whether orally, or by writing, or even by deed, unless expressly or impliedly excluded by the terms actually agreed on: *Wigglesworth v. Dallison* (1779) 1 Doug. 201.

But if the lease or agreement contain terms or stipulations which are inconsistent with the custom of the country, such custom will be thereby excluded, upon the principle *expressum facit cessare tacitum*: *Hutton v. Warren* (1836) 1 M. & W. 466.

In *Talbot v. Poole* (1892) 15 P. R. 99, the lessor claimed that the lessee did not cultivate the farm in a good husband-like and proper manner. The lessee alleged that he had used the premises in a tenant-like and proper manner "according to the custom of the country where the same was situate." The Court said this did not refer to a custom in the strict legal signification of the word, for that must be taken with reference to some defined limit or space. But what shall be considered in farming as a good and husband-like manner must vary exceedingly according to soil, climate, and situation, and must be applied to the approved habits of husbandry in the neighborhood under circumstances of the like nature.

The implied obligation on the part of a tenant to use the premises in a husband-like manner will be broken if it be shown that dung and compost have been carried off the premises without any agreement to that effect having been entered into: *Powley v. Walker* (1793) 5 T. R. 373.

In New Brunswick it is not contrary to the course of good husbandry to remove manure from a farm; and, in the absence of any custom or special agreement to the contrary, the outgoing tenant has a right to the manure lying in heaps in the barnyard, and may take it away as a personal chattel after the end of the term: *Foshay v. Barnes* (1869) 12 N. B. R. 450.

A tenant from year to year of farming premises is bound by law only to fair and tenantable repairs, so as to prevent waste or decay of the premises, and not to substantial and lasting repairs, in the absence of any stipulation in that behalf: *Ferguson v. ———* (1797) 2

Esp. 590; for the law will not imply a contract on the part of such tenant to repair generally, or to do any particular acts; but merely to use the farm in a tenant-like and husband-like manner, according to the custom of the country in which the farm is situated: *Horsefall v. Mather* (1815) Holt, N. P. C. 7.

Clauses in agricultural leases should be precise: *Alexander v. Walters* (1909) 10 W. L. R. 441 [B. C.—Morrison, J.].

### *Express Covenants.*

A lease by the rector of rectory land contained a covenant not to clear more than 180 acres of the land demised; that the clearing should be for agricultural purposes in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned according to the due course of farming and husbandry." A covenant to clear the land when the timber was cut down had been struck out. The lessee with the lessor's consent cut and sold the timber off 180 acres; but for two years after did nothing towards clearing this portion of the land demised, and it was held that the delay was a violation of the covenant as to chopping, etc., in the due course of husbandry: *Lundy v. Tench* (1870) 16 Gr. 597; 2 E. & E. Dig. 13.

A lessee covenanted that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now or shall hereafter be brought under cultivation, in a good husband-like and proper manner, and shall not, nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises; and also shall and will sufficiently repair and keep repaired the erections and buildings, fences and gates, erected or to be erected upon the said premises; the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite." The lessor having brought an action on the above covenant claiming

damages against the lessee on the ground that he had converted certain pasture into arable land, which, however, the jury found was an act of proper husbandry, whereupon judgment was entered for the defendant; it was held that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so as that he might limit it to the buildings, fences, and erections existing at the date of the lease: *Cook v. Edwards* (1885) 10 O. R. 341; 2 E. & E. Dig. 13.

A lessee covenanted to bring the premises into cultivation within five years from the date of the lease according to the most approved method of husbandry pursued in the neighborhood, and to keep the same in good farming and husband-like condition. The former covenant was not performed by the lessee, and it was held that his assignee could not be compelled thirty years afterwards to perform the latter covenant and keep the premises in good farming condition, and that his converting the same into a place of amusement could not be restrained: *Musgrave v. Horner* (1874) 31 L. T. 632; 23 W. R. 125; 2 E. & E. Dig. 14.

A covenant to cultivate the demised land "in a husband-like and proper manner" means to cultivate according to the course of farm cultivation and management in that part of the country where the land is situate: *Coulter v. McCarter* (1911) 17 W. L. R. 720; 4 Sask. L. R. 178; 2 E. & E. Dig. 15.

In *Scott v. Given* (1911) 19 W. L. R. 713; 1 W. W. R. 388 [Sask.—Lamont, J.]: on the evidence it was held there had been no breach of a covenant to summer-fallow.

A covenant in a lease that the lessee will "take proper care of the fruit trees" *prima facie* only applies to the trees planted and growing on the premises at the time the lease is executed. It seems it would not apply to trees

planted by the lessor under a verbal agreement subsequent to the execution of the lease: *Crozier v. Tabb* (1876) 26 U. C. C. P. 369.

A lessee who covenanted with his lessor "to care for, protect and irrigate the trees now growing upon the said land" held liable for damages to a grove of trees injured by his horses and cattle, although the trees were not shut off from the barn by any fence. Lessor's agreement to furnish the necessary material in connection with lessee's covenant to "keep up fences" held referable only to fences existing at the date of lease. Fences to protect said trees would have to be built by lessee at his own expense. Lessor held entitled to recover notwithstanding that before action begun he had sold the land but had received only \$1 on the purchase price: *Pawson v. Tangye* [1919] 1 W. W. R. 888 [Alta.].

In *McPherson v. Giles* (1919) 16 O. W. N. 183; 45 O. L. R. 441 [Clute, J.] a claim was made for breach of the covenant to work the farm in a husband-like manner, the plaintiff alleging that the ploughing was not 6 inches deep, as required by the lease. As to this, the learned Judge said that a small quantity of land was not in fact ploughed 6 inches deep, but the evidence did not satisfy him that there was any injury to the reversion.

A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon, and it was held that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee, a married woman, was overholding: *Elliott v. Elliott* (1890) 20 O. R. 134; *Shier v. Shier* (1872) 22 U. C. C. P. 147.

In *Snetzinger v. Leitch* (1900) 32 O. R. 440; 21 C. L. T. 157; 2 E. & E. Dig. 23, the lease considered contained the following clause: "All the hay, straw and corn stalks raised on the farm to be fed to the same cows on the . . . farm." It was held that even if the property in such hay were in the tenant he could not have the beneficial use of it or take it off the farm in view of his contract; he was bound to feed it to the cattle on the premises. It



was also held that an execution creditor had no higher rights than the tenant.

*Gardner v. Perry*, noted at p. 846, and *Atkinson v. Farrell* at p. 846, should also be considered.

See also *Bradley v. McClure* and the other cases as to diverting the premises to a use not contemplated at the time of the lease: [p. 156, *ante*].

A lessee covenanted to clear up and fence five acres each year, and to split and put up into fences 500 rails each year, to fence said land cleared by him, and there was a right of re-entry on breach. This number of rails would not nearly fence five acres, but it was held that the covenant was satisfied by clearing five acres each year and fencing with a fence of some kind, in this case a brush fence as to part in which and another fence 500 rails were used. It was also held that the clearing need not be in blocks of five acres, and that the lessee having finished clearing three acres which had been chopped by the lessor, part of a larger field, but was unfit for cultivation without logging, burning, etc., and fenced it in on one side so as to form a lane which was required between this fence and an old fence there before, and having cleared more than two acres elsewhere, had complied with the covenant: *McLaren v. Kerr* (1878) 39 U. C. R. 507.

In *Clarke-Jervoise v. Scutt* [1920] 1 Ch. 382; 89 L. J. (Ch.) 218, a covenant not to plough up "grass land" applied to land laid down as grass land after the date of the lease.

### *Waste Defined.*

"There are two kinds of waste, viz.: Voluntary or actual, and permissive." Co. Lit. 53a.

Waste is either voluntary, *i.e.*, actual or commissive,—as by pulling down houses, etc.; or permissive, which is a matter of negligence and omission only,—as by suffering buildings to fall or rot for want of necessary reparations: Co. Lit. 53; Wood's Inst. 521; Bac. Abr. tit. Waste (B.).

“ Voluntary waste is divisible into (a) meliorating waste, and (b) equitable waste.” Stroud 2217.

Meliorating waste is such voluntary waste as improves the demised premises, as where a tenant puts a new front to his house. In respect of such waste, it seems that unless substantial damages be proved, the tenant will not be interfered with by injunction: *Doherty v. Allman* (1878) 3 A. C. 709; *Re McIntosh v. Pontypridd Improvement Co.* (1891) 61 L. J. (Q. B.) 164; *Holderness v. Lang* (1886) 11 O. R. 1.

Equitable waste consists in acts of gross damage, usually the cutting down ornamental timber by a tenant without impeachment of waste: *Garth v. Cotton* (1750) 1 Ves. Sr. 524; 2 White & Tudor’s L. C. (8th ed.) 1026.

A man cannot commit waste even technically, if he is doing that which he is entitled to do by his contract—that is to say, he cannot commit waste as against his landlord if the latter has entered into a special contract enabling him to do it: *Meux v. Cobley* [1892] 2 Ch. 253, at p. 262; 61 L. J. (Ch.) 449, per Kekewich, J.

Waste as distinguished from trespass can only be committed by a limited owner between whom and the person complaining thereof there is privity of estate: *Garth v. Cotton* (*supra*).

### *How Far Does the English Law Apply in Canada?*

*Prima facie* cutting down all timber on a lot, even for the purpose of converting it to tillage or grazing, is waste and an injury to the inheritance. But whether a different rule prevails in Canada from that in England must depend on the circumstances of each case, whether the acts done were or were not waste: such as the extent of the lot or estate, the quantity cleared of timber, the nature of the timber cut, whether such timber is usually cut for clearing purposes, or was valuable merely as timber, and whether a reasonable quantity for ordinary farm purposes was reserved: *Drake v. Wigle* (1872) 22 U. C. C. P. 341, per Hagarty, C.J. (1874) 24 U. C. C. P. 405.

The different conditions of this country make the application of the doctrines as to waste somewhat differ-

ent from England, though the principle is the same. Here a tenant for life may cut down timber in the proper course of good husbandry in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber: *Saunders v. Breakie* (1884) 5 O. R. 603; following *Drake v. Wigle* (*supra*) 24 U. C. C. P. 405.

The law of England as to the taking of timber was held not applicable to the condition of New Brunswick in 1849, and if a tenant cut down trees for the purpose of clearing wilderness land, they belonged to him, and the cutting was not waste, but the onus was on the tenant to show that they were cut for the purpose of clearing the land. Acts which would be waste, if done by the tenant, cannot be justified by any person acting under his authority: *Rector v. Titus* (1849) 6 N. B. R. 278.

And it would seem that in Canada, where the cutting of timber is necessary for clearing land, the rule in England cannot be held to apply: *Lewis v. Godson* (1888) 15 O. R. 252, disapproving of *Saunders v. Breakie* (*ante*).

### *Acts and Omissions Which are Waste.*

Voluntary waste chiefly consists in felling timber trees: Bac. Abr. tit. Waste (C. 2); *Lewis v. Godson* (*ante*); *Rector v. Titus* (*ante*); pulling down houses; Co. Lit. 53; Bac. Abr. tit. Waste (C. 5); opening mines or pits: Id. (C. 3); or changing the course of husbandry: Id. (C. 1).

Removing wainscots, floors, or other things once fixed to the freehold of a house, is waste: Bac. Abr. tit. Waste (C. 6); and if the windows be broken or carried away, it is waste, although they were glazed by the tenant himself, for the glass is part of the house: Co. Lit. 53.

Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters or other timber of the house become rotten; but merely suffering them to be uncovered, without rotting the timber, is not waste; or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down; although it would be otherwise if the tenant were to pull

it down, unless he re-erect it again forthwith: Co. Lit. 53a; Bac. Abr. tit. Waste (C. 5); but if a house built *de novo* was never covered in, it is not waste to abate it: Co. Lit. 53a; (note 345). If a lessee permit the walls to decay for default of daubing or plastering, that is waste: 2 Roll. Abr. 816, pl. 36-7. If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste: Co. Lit. 53b.

It would be waste to make such alterations as to change the nature of the thing demised. Where the thing demised is premises which the lessee may consistently with the lease use for many purposes for which they are without alteration and adaptation not suitable, a right reasonably to alter and adapt is to be implied. The Court will look jealously to see whether the acts done are such as to diminish the value of the reversion. See the dissenting judgment of Buckley, L.J., in *Rose v. Spicer*, *Rose v. Hyman* [1911] 2 K. B. 234 [C.A.], adopted by the Lords in *Hyman v. Rose* [1912] A. C. 623, and followed by Middleton, J., in *Toronto Harbor Commissioners v. Royal Canadian Yacht Club* (p. 617).

In *Hyman v. Rose*, lessees of a chapel which was demised for ninety-nine years, sold the lease when about half the term had expired. The purchasers made alterations to convert the chapel into a cinematograph theatre. There was no covenant prohibiting the use of the demised property for such purposes. Lord Loreburn, L.C., said of the contemplated changes ([1912] A. C., at p. 632): "It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease."

*Hyman v. Rose* was followed by Middleton, J., in *Sullivan v. Doré* (1913) 25 O. W. R. 31; 5 O. W. N. 70; 13 D. L. R. 910, where he held that mere alterations to make the building more suitable for the business carried on therein—were not a breach of the covenant against waste—see p. 1103, and that in any case relief from forfeiture would be granted upon payment into Court of an amount sufficient to ensure a return of the premises

to their old plight and condition at the expiration of the lease: *Holman v. Knox* [*post*, p. 762], considered and modified.

A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them, such an act on the part of the tenant not being waste: *Lewis v. Godson* (1888) 15 O. R. 252, disapproving of *Saunders v. Breakie* (1884) 5 O. R. 603.

"But this case does not determine that a tenant has the right to take and remove the body of the soil itself," per Middleton, J., in *Toronto Harbor Commissioners v. Royal Canadian Yacht Club* (1913) 29 O. L. R. 391, where he granted an injunction to restrain the removal of sand from water lots demised to the defendant. The lease contained a covenant that the lots should be used for mooring purposes, and the purpose of obtaining access to the club house property. The tenants were dredging sand and selling it.

Where there is no negative covenant obliging the lessee not to change the use of the premises, it seems he may pull them down and rebuild on an improved plan without being liable for waste: *Doherty v. Allman* (1878) 3 A. C. 709; see *Meux v. Cobley* [1892] 2 Ch. 253; 61 L. J. (Ch.) 449.

Where there is no covenant restraining a lessee from erecting buildings, and he is bound to keep all future buildings in repair, to build a new house on the demised land is not waste, unless it be an injury to the inheritance in the sense of destroying identity by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law which has not been extended in modern times: *Jones v. Chappel* (1875) L. R. 20 Eq. 539; 44 L. J. (Ch.) 658; *Doe d. Grubb v. Burlington [Earl]* (1833) 5 B. & Ad. 517; and would seem not to be applicable where there is a system of registry: *Doherty v. Allman*, *supra*, per Lord O'Hagan, at p. 726.

*Acts and Omissions Which are Not Waste.*

If a house be destroyed by tempest, lightning or the like, which is the act of God, it is not waste: Bac. Abr. tit. Waste (E.); Co. Lit. 53*a*; [see p. 613] but if the house be uncovered by tempest, it is said that the tenant must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting: Co. Lit. 53*a*; Bac. Abr. tit. Waste (C. 5).

The lessees leased premises to use as a laundry. They opened the ceiling of the first floor and the floor of the second to pass belts through to a shafting above. There was no structural alteration, no interference with the integrity of the structure, and no real damage. A small expenditure would restore the ceiling and wall to their original condition and leave no trace of what had been done. The acts were of much less consequence than those in *Holderness v. Lang* (*post*, p. 1105). It was held there was no waste. The habendum embraced the whole premises for use as a laundry. It was held, following *Manchester Bonded Warehouse Co. v. Carr* [*post*], that there was nothing to prevent their reasonable user as a laundry so long as there was no waste: *Klees v. Dominion Coat and Apron Co.* (1905) 6 O. W. R. 200 [C. A.] affirming (1904) 3 O. W. R. 841.

In a lease of a newly constructed grain warehouse, there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it in a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises; and it was held that there was no waste by the lessee, and that the lessor was under the covenant bound to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged: *Saner v. Bilton* (1878) 7 Ch. D. 815; 47 L. J.

(Ch.) 267; *Manchester Bonded Warehouse Co. Ltd. v. Carr* (1880) 5 Ch. D. 507; 49 L. J. (C.P.) 809.

### *The Statutes.*

The Statute of Marlebridge 1267 (52 Hen. 3, c. 23, s. 2), enacted, "that farmers during their terms shall not make waste or exile of houses, woods or men, nor of anything belonging to the tenements that they have to farm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

### *Similar Legislation.*

R. S. O. 1914 c. 109, s. 32.

By the Statute of Gloucester (1278) (6 Edw. 1, c. 5), a writ of waste was given against lessee for life or years, or tenant *pur autre vie*; or against assignee of tenant for life or years for waste done after the assignment.

### *Similar Legislation.*

R. S. O. 1914 c. 109, s. 29, provides that a tenant by the curtesy, a doweress, a tenant for life or for years and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured.

"Tenants in common and joint tenants, shall be liable to their co-tenants for waste, or, in the event of a partition, the part wasted may be assigned to the tenant committing such waste, at the value thereof to be estimated as if no such waste had been committed."

R. S. O. 1914 c. 109, s. 31: Statute of Westminster, Sec. 13 Edw. I. c. 22.

### *Accidental Fires.*

By 14 Geo. III., c. 78, s. 86, "no action, suit or process whatsoever shall be had, maintained or prosecuted

against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby;" provided "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

At common law lessees were not answerable to their landlords for accidental or negligent burning; then came the Statute of Gloucester [*ante*, p. 619], which, by making *tenants for life and years* liable to waste, without any exception, rendered them answerable for destruction by fire.

Therefore the above Act was passed.

### *Similar Legislation.*

New Brunswick: C. S. N. B. 1903 c. 152, s. 25.

Ontario: The Accidental Fires Act, R. S. O. 1914, c. 118, s. 2, is copied from the above Act. Before the passing of 1 Geo. V. c. 19, s. 2, the original of R. S. O., c. 118, s. 2, it was held that the 14 Geo. III. c. 78, s. 86, was in force in Ontario as part of the law of England introduced by the 31 Geo. III. c. 31, but that it had no application to protect a party from legal liability as a consequence of negligence: *Canada Southern Railway Co. v. Phelps* (1884) 14 S. C. R. 132 [S. Ct. Can.—Ont.].

It was also held not to apply where the fire is lighted intentionally and mischief results to a neighbor: *Filliter v. Phippard* (1847) 11 Q. B. 347; 17 L. J. (Q. B.) 89; *Vaughan v. Taff Vale Railway Co.* (1860) 5 H & N. 679.

"As to whether the fire was negligently allowed to spread: *Gaston v. Wald* (1860) 19 U. C. Q. B. 586, would appear to be in point. It was there held that a fire occasioned in similar circumstances was an accidental fire. The defendant went out, leaving a fire in his stove, with no one to watch it, and a block of wood too close to the stove: *Filliter v. Phippard* (*ante*), and *Vaughan v. Menlove* (1837) 3 Bing. (N.C.) 468; 6 L. J. (C.P.) 92, relied on here by the plaintiff, were both considered by



Robinson, C.J., and distinguished." per Taylor, J., at p. 360, in *Paul v. Currah*, noted at p. 628, *post*.

In *Wolfe v. McGuire* (1897) 28 O. R. 45, it was held that in a case where a yearly tenant had not covenanted to repair, an accidental fire by which the leased premises were burned, was permissive and not voluntary waste.

### *Covenants to Insure.*

In Ontario or Manitoba the Short Forms Lease considered in Appendix A, p. 1097, *post*, contains no covenant to insure. But the English and British Columbia Acts provide such a covenant, see p. 1117, *post*; there is nothing to prevent the insertion of a covenant binding either the lessor or lessee to insure the premises demised: see *Reynard v. Arnold* (1875) L. R. 10 Ch. 386. The insurance may be in the joint names of the lessor and lessee: *Doe d. Muston v. Gladwin* (1845) 6 Q. B. 953; *Wilson v. Wilson* (1854) 14 C. B. 616; *Green v. Low* (1856) 22 Beav. 625; or in the name of the lessor; *Penniall v. Harborne* (1848) 11 Q. B. 368; *Douglass v. Murphy* (1858) 16 U. C. R. 113; or of the lessee.

The lease may also provide for the production of the policy and receipt for the premium for the current year to the lessor or his agent on request: *Doe v. Whitehead* (1838) 8 A. & E. 571.

A lessor covenanted for himself and assigns to insure the demised premises, and in case of loss by fire, if he were entitled to recover the insurance money, or in case they be not insured, then if the fire were under such circumstances as would entitle him to his loss if he had insured, then in either case he would re-build, and during the time the premises were unfit for use a "fair reduction and allowance shall be made in the rent." The Court held that this covenant ran with the land and bound an assignee of the reversion: *McGill v. Proudfoot* (1847) 4 U. C. R. 33.

A covenant by the lessee to insure the demised premises in the name of the lessor, the insurance money to be expended in the erection of new buildings, runs with

the land, and an assignee of the lease is liable thereon, although assigns be not expressly named: *Douglass v. Murphy* (1858) 16 U. C. R. 113. In such case the lease may provide that if the lessor insure, the premiums paid by him may be added to the rent: *Id.*

Where a lessee has covenanted to insure and keep insured the buildings demised, or any part thereof, it will be a breach of the covenant if he permit them to remain uninsured, although it be only for a short period of time, and no fire or damage happen: *Doe v. Shewin* (1811) 3 Camp. 134; *Wilson v. Wilson* (*supra*); *Doe v. Ulph* (1849) 13 Q. B. 204; 18 Id. 106. But where a lessee, having covenanted to keep £800 insurance on the premises, effected an insurance containing a memorandum, that in case of the death of the insured the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and an indorsement continuing the policy to his personal representative was made after the expiration of the three months, it was held to be no breach of the covenant to insure: *Doe v. Laming* (1814) 4 Camp. 73. Where a lessee covenants to insure and keep insured the buildings demised, and to deposit the policy with the lessor, the covenant does not mean that he is to effect one policy and keep that policy on foot, but that the premises shall always be kept insured by one policy or another; and it is a breach if they are uninsured at any one time, and a continuing breach for any portion of the time they are uninsured: *Doe v. Peck* (1830) 1 B. & Ad. 428; *Hyde v. Watts* (1843) 12 M. & W. 254; 1 D. & L. 479; *Doe v. Jones* (1848) 5 Exch. 498. Where there is a covenant to insure and continue insured the premises in the joint names of the lessor and lessee, an insurance in the name of the lessee only will not be a compliance with the covenant, and such breach cannot be waived by acceptance of rent, for it is a continuing one: *Doe d. Muston v. Gladwin* (1845) 6 Q. B. 953.

If the lessee covenants to insure the buildings from time to time and at all times, there will be a breach by an omission to insure for two months or even less: *Penniall*

v. *Harborne* (1848) 11 Q. B. 368. Though the covenant be not strictly complied with, yet if the conduct of the lessor would induce a reasonable and cautious lessee to conclude that he was doing all that was necessary or required of him, the lessor cannot recover for a forfeiture though there be no dispensation or release from the covenant: *Doe v. Rowe* (1826) Ry. & Moo. 343; *Re Curry* (1900) 33 N. S. R. 392; and where the lessee was to insure, with a proviso that if he did not the lessor might, it was held that the latter could not recover for a forfeiture if by his conduct he had led the lessee to believe the premises were insured by himself: *Doe v. Sutton* (1841) 9 C. & P. 706.

The measure of damages for breach of a covenant by a lessee to insure the demised premises in the name of the lessor where the insurance money is to be expended in the erection of new buildings is the value of the premises, such value not exceeding the amount for which the insurance was to be effected; and it makes no difference that on failure of the lessee to insure, the lessor is allowed by the lease to do so, and charge the premiums as rent: *Douglass v. Murphy* (1858) 16 U. C. R. 113.

As a policy of insurance is a contract of indemnity, if the lessor insure against a loss covered by the lessee's covenant to repair, and on a loss occurring the tenant reinstates the premises pursuant to his covenant, the company may recover the insurance money back from the landlord, having paid it before the repairs: *Darrell v. Tibbits* (1880) 5 Q. B. D. 560; 50 L. J. (Q. B.) 33 [C.A.].

Under the terms of a lease the landlord covenanted to insure and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option the buildings were burnt and the landlord received the insurance money. The tenant then exercised his option and claimed the insurance money as part of his purchase. It was held that as there was no binding contract to purchase at the time of the fire the tenant was not the owner of the property or entitled to the insurance money: *Edwards v. West* (1878) 7 Ch. D. 858; 47 L. J. Ch. 463.

A tenant was bound to insure against fire and had an option of purchasing the property, and both landlord and tenant insured, the former without the latter's knowledge. After the fire the tenant exercised his option to purchase. The insurance company apportioned the loss between both policies, and it was held that the landlord was not entitled to retain the proceeds of his policy, nor to insist on their being applied in reinstating the property after the tenant had decided to purchase: *Reynard v. Arnold* (1875) L. R. 10 Ch. 386.

The proviso for re-entry must be made applicable to the covenant to insure, otherwise the breach thereof will only be ground for an action for damages: *post*, p. 715.

Relief against forfeiture for breach of a covenant to insure is dealt with at pp. 756 and 759, *et seq.*

Construction of covenants: See *Upjohn v. Hitchens*, *Upjohn v. Ford* [1918] 2 K. B. 48; 87 L. J. (K. B.) 1206; *Enlayde Lim. v. Roberts* [1917] 1 Ch. 109; 86 L. J. (Ch.) 149.

Although an insuring tenant is bound to expend insurance money on rebuilding, an insuring landlord is not: *Lofft v. Dennis* (1859) 28 L. J. (Q. B.) 168.

Tenants covenanted to keep the leased premises insured in a solvent company, and that on their default the landlord might place insurance. The tenants did not occupy the premises and so could not insure them. The landlord placed the insurance at a higher premium, but with a company whose solvency the tenants questioned. It was held that the tenants must pay the premiums: *Bannerman v. Consumers* (1908) 5 E. L. R. 456.

By 14 Geo. III., c. 78, s. 83, insurance offices are "authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other building which may be burnt down, demolished or damaged by fire; or (without such request) upon any grounds of suspicion that the owner or owners, occupier or occupiers, or any person or persons who shall have insured such house or houses or other buildings, shall have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the

insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days next after his, her or their claim is adjusted, give a sufficient security to the governors or directors of such insurance office, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

This Act is in force in Ontario: *Carr v. Fire Ins. Assc'n* (1888) 14 O. R. 487; *Stinson v. Pennock* (1868) 14 Gr. 604. The point was not decided in New Brunswick: *Randolph v. Randolph* (1908) 4 E. L. R. 17; 3 N. B. Eq. 576. To entitle a landlord or other owner to the benefit of it, he must make a distinct request to the insurance office to apply the policy money in rebuilding before they have settled with the tenant insuring; and in no case is the landlord or owner entitled to rebuild himself and claim the policy money: *Simpson v. Scottish Union Insurance Co.*, (1863) 1 H. & M. 618; 32 L. J. (Ch.) 329; *Randolph v. Randolph* (*supra*), holding that the Act does not apply to machinery belonging to a lessee. His remedy is by a *mandamus* after a sufficient request and refusal: *Id.* A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured: *Id.* Trade fixtures put up by a tenant and removable by him are not within the words "houses or other buildings," as used in the section: *Re Barker, Ex parte Goreley* (1864) 34 L. J. (Bcy.) 1.

In *Wimbledon Park Golf Club v. Imperial Insurance Co.* (1902) 18 T. L. R. 815; 22 C. L. T. 363, the plaintiff, lessees of a building destroyed by fire, asked for a *mandamus* to compel the defendants to expend the insurance moneys payable by them to the lessor, who had coven-

anted to keep the building in repair, in rebuilding; or in the alternative to compel the defendants to take sufficient security from the lessor for reinstatement of the building. It was held there was no imperative obligation under the statute upon the company to rebuild, and in the case of a financially responsible lessor his personal bond without sureties would be sufficient. *Seemle*, the proper remedy would be an injunction to restrain the payment by the insurance company of the money until proper security for its due expenditure should be given.

By the Laws Declaratory Act, R. S. B. C. 1911, c. 133, s. 2 (13), a lessor or mortgagee entitled to the benefit of a covenant to insure is to have the benefit of any informal insurance effected by the mortgagor or lessee.

### *Who are Liable for Waste?*

A lessee is liable for waste done by a stranger, if the lessee himself would have been committing waste in doing the act: *Greene v. Cole* (1670), 2 Wm. Saund. 259b (n); *Crawford v. Bugg* (1886) 12 O. R. 8, at p. 15; *Gray v. McLennan* (1885) 3 M. R. 337.

### *Tenant for Life.*

Tenants for life or lives are liable for voluntary but not for permissive waste, unless expressly bound to keep the premises in repair.

In *Re Cartwright, Avis v. Newman* (1889) 41 Ch. D. 532, it was held that tenants for life were not liable for permissive waste: this case was followed by *Boyd, C.*, in *Patterson v. Central Canada Loan and Savings Co.* (1898) 29 O. R. 134 [and see *Morris v. Cairncross* (*ante*, p. 69), at p. 548 of 14 O. L. R.], and by *Teetzel, J.*, in *Munro v. Toronto R. W. Co.* (1904) 9 O. L. R. 299, 305; and see 2 White & Tudor, L. C. [8th ed.] p. 1026.

Where the grantor or deviser imposes the liability of keeping the premises in repair upon the life tenant, he is liable for permissive waste: *Woodhouse v. Walker* (1880) 5 Q. B. D. 404; 49 L. J. (Q.B.) 609.

Although the Statute of Marlebridge [p. 619, *ante*], applies to "permissive" waste: see 18 Hals., p. 499, note (h): *Morris v. Cairncross* (1907) 14 O. L. R. 544, and also puts leases for lives and leases for years on the same footing, tenants for years are liable for permissive waste [see p. 619], but tenants for life are not — "an illogical result"—per Meredith, C.J.O., in *Morris v. Cairncross* (p. 628), at p. 562; and see at p. 559.

A tenant for life is liable for negligent but not accidental burning: see p. 620, *ante*.

By the R. S. O. (1914) c. 109, s. 30, "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

This clause in effect abolishes the distinction between legal and equitable waste by taking away from the tenant for life without impeachment of waste the legal right to commit equitable waste.

See the provisions of s. 29 set out at p. 619, *ante*.

### *Similar Legislation.*

Alberta: (1919) 9 Geo. V. c. 3, s. 37 (2).

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (9).

Manitoba: R. S. M. 1913, c. 46, s. 26 (b).

New Brunswick: (1909) 9 Edw. VII. c. 5, s. 19 (3).

Saskatchewan: (1915) 5 Geo. V. c. 10, s. 25 (2).

### *Tenant for Years.*

A tenant for years is clearly within the Statute of Gloucester [see p. 619], and consequently liable not only for voluntary but also for permissive waste: *Yellowly v. Gower* (1855) 11 Exch. 274; *Davies v. Davies* (1888) 38 Ch. D. 499; *Morris v. Cairncross* (1907) 14 O. L. R. 544 [Div. Ct.] 9 O. W. R. 918; 7 O. W. R. 834; 18 Hals., s. 981.

In *Morris v Cairncross*, Meredith, C.J.O., in an elaborate judgment in which all the authorities are considered, says [p. 570] he is led "to the conclusion that *Yellowly v. Gower* was rightly decided, and that its authority has not been impugned or affected by any subsequent case or displaced by the provisions of the Judicature Act" [see p. 106, *ante*].

A tenant for years is liable for negligent but not accidental burning: see p. 619, *ante*.

### *Tenant from Year to Year.*

A tenant from year to year is liable for both voluntary and permissive waste: 18 Hals., s. 981.

The liability for permissive waste appears to exist in spite of what was said in *Torriano v. Young* (1833) 6 C. & P. 8, but in practice the liability has been limited by reference to what is reasonable, having regard to the tenancy rather than to the doctrine of waste: *Yellowly v. Gower*, *ante*, p. 627; 18 Hals. s. 981, note (i), p. 499. And see per Meredith, C.J.O., in *Morris v. Cairncross* (1907), 14 O. L. R., at p. 557; discussing *Jones v. Hill* (1817) 7 Taunt. 392: at p. 559.

*Meisner v. Meisner* (1905) 36 S. C. R. 34; 25 C. L. T. 101; 37 N. S. R. 23, a case of voluntary waste (cutting timber) turned upon a question of fact.

A tenant from year to year is liable neither for negligent nor accidental burning.

In *Paul v. Currah* [1919] 2 W. W. R. 359; 12 Sask. L. R. 278, Taylor, J., said: "But at common law tenants were not answerable to their landlords for accidental or negligent burning: Woodfall, 19th ed., 768; Clarke's Landlord and Tenant, p. 426; 18 Halsbury 498, note (b). Such an action was 'an action on the case in the nature of waste,' and neither at common law nor under the Statute of Marlebridge (p. 619, *ante*), or the Statutes of Gloucester (p. 619, *ante*), would it lie against a tenant from year to year, who was not considered a tenant for years, but only as tenant at will, subject and entitled to the agreed notice to quit: see Woodfall, 19th ed., 729,



and cases there cited. The distinction is drawn in *Panton v. Isham* (1693) 3 Lev. 359. The plaintiff demised to the defendant one of six stables 'from week to week at 8s. per week.' Fire owing to the defendant's negligence started in the demised stable and destroyed all the stables. For the one demised he was held not liable, for the others to which it spread he was held liable, he was tenant at will, against whom no action lay for negligent waste."

### *Tenant at Will.*

A tenant at will is not liable for either voluntary or permissive waste: 18 Hals. s. 981.

But an act of voluntary waste terminates the tenancy and the late tenant is liable in damages for trespass: 18 Hals. s. 981; Lit. s. 71: *Kokatt v. Melidonis* [1920] 3 W. R. 800, 55 D. L. R. 155 [Sask.—C.A.] a case of negligent burning).

In the absence of any express or implied stipulation on the subject, a tenant at will is not liable to general repairs; nor for *permissive waste*; nor to make good mere wear and tear of the premises; but only to keep them wind and water tight: *Torriano v. Young* (1833) 6 C. & P. 8; *Gibson v. Wells* (1805) 1 B. & P. N. R. 290.

He is bound to commit no waste, and to make fair tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but he is not bound to do substantial and lasting repairs, such as new roofing, etc.: *Ferguson v. ———* (1797) 2 Esp. 590.

"That the case of tenant at will is not within the statutes is clear": per Meredith, C.J.O., in *Morris v. Cairncross* (*ante*, p. 628), at p. 558.

As to liability for fire, see pp. 619, *et seq.*, *ante*.

### *The Criminal Law.*

Under the Criminal Code [R. S. C. 1906, c. 146] by s. 529, every one is guilty of an indictable offence, and

liable to five years' imprisonment, who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, which is built on lands subject to a mortgage, or which is held for any term of years, or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner:

(a) Pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected, or

(b) Pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

### *The Covenant to Repair.*

A conveyancer should insert in a lease, and the Short Forms leases contain, covenants (1) to repair and keep in repair the demised premises during the term; (2) another distinct covenant to repair and make good, within three calendar months after notice, all want of reparation which shall be found on entry by the lessor to view the state of repair; (3) a covenant to leave or deliver the premises in good and substantial repair at the end or other sooner determination of the term, reasonable wear and tear and damage by fire and tempest only excepted.

### *Scope of the Covenant to Repair and Keep in Repair.*

This covenant in a Short Forms lease is dealt with at p. 1103, *post*.

Compare the covenant to repair and keep in repair "implied" in leases in Alberta, Manitoba and Saskatchewan, noted at p. 162, *ante*.

General covenants to repair and leave in repair, extend to all buildings erected during the term: *Dowse v. Earle* (1690) 3 Lev. 264; Bac. Abr. Covenant (F.).

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair. A literal

performance of the covenant is not required: *Harris v. Jones* (1832) 1 Mood. & R. 173.

It seems that a tenant who covenants to repair is bound to sustain and uphold the premises: *Auworth v. Johnson* (1832) 5 C. & P. 239; he is clearly liable to do his best to keep it in the same condition, and therefore should keep it covered and use other necessary care: *Ferguson v. ———* (1797) 2 Esp. 590.

A tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan: *Soward v. Leggatt* (1836) 7 C. & P. 613.

Where a lessee covenants to repair all houses erected and built, or to be erected and built, on the demised premises, or any part thereof, he must repair all buildings on the demised premises though some are erected after the date of the lease on a portion of the premises not built on when the lease is made: *Hudson v. Williams* (1879) 39 L. T. 632. But it is otherwise if the covenant be merely to repair without expressly extending to buildings to be erected and built on the premises: *Cornish v. Cleife* (1864) 3 H. & C. 446; 34 L. J. (Ex.) 19; 11 L. T. 606.

But where, in a lease of land with buildings on it, the covenant was to repair the buildings demised, and to rebuild them if necessary, and to keep the fences in repair; it was held that the tenant was not bound to keep in repair additional buildings erected on other parts of the land: *Doe d. Worcester Trustees v. Rowlands* (1841) 9 C. & P. 734; *Cornish v. Cleife* (*supra*). Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon during the term; the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and enjoyed it with the farm; held that the tenant was also under an obligation to keep the house in repair: *White v. Wakely* [No. 1] (1858) 26 Beav. 17; 28 L. J. (Ch.) 77.

*Lurcott v. Wakeley & Wheeler* [1911] 1 K. B. 913 [C. A.] W. N. 46; 31 C. L. T. 400, was the case of a

covenant "well and substantially to repair . . . and to keep in thorough repair and good condition." It was held that the lessee was bound to bear the expense of rebuilding an external wall condemned as a dangerous structure, even though the unsafe condition of the wall were caused by old age and lapse of time. The Court of Appeal said that repair frequently involved renewal, but that did not relieve the tenant from liability unless the renewal or rebuilding was such as essentially to change the character of the demised premises so that the landlord was getting an entirely new subject-matter—as in *Torrens v. Walker* [1906] 2 Ch. 166, and *Lister v. Lane & Nesham* [1893] 2 Q. B. 212. In this case the building was only of a subsidiary portion and the lessees, on the authority of *Proudfoot v. Hart* (1890) 25 Q. B. D. 42, were liable on the covenant to repair the wall in the only way in which it could be repaired.

Following *Lurcott v. Wakeley*, Mr. Walter Strachan, in an article in the Law Quarterly Review (1911) copied in 31 C. L. T. 923, discusses the meaning of "to repair" in the light of *Lister v. Lane* and the other cases discussed *post*, and lays down five principles derived therefrom. They are as follows:

"I. A covenant 'to repair' or 'keep in repair' [*Payne v. Haine*, *Proudfoot v. Hart*] obliges the covenantor to restore by renewal, or replacement, such parts of the subject-matter of the covenant as are defective [*Lurcott v. Wakeley*'].

"II. But a repairing covenant does not oblige the covenantor to repair by building the whole subject-matter of the covenant if the Court holds that the necessity to rebuild arises from circumstances not contemplated by the parties when the covenant was entered into: [*Lister v. Lane*, *Wright v. Lawson*, *Torrens v. Walker*, *Hugall v. McKean*'].

"III. Unless the terms of the lease are repugnant, the surrounding circumstances may (as in the case of other documents) be regarded in construing repairing covenants therein. Therefore the age, class and locality [*Proudfoot v. Hart*] of the premises may be taken into account in order to measure the extent of the repairs."

“IV. ‘Good tenantable repair’ and similar expressions mean such state of repair, having regard to the age, character and locality of the premises, as would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them.”

“V. The words ‘reasonable wear and tear excepted,’ and clauses of similar import qualifying repairing covenants mean that if the covenantor has performed those covenants at the time specified, or as usage prescribes, he will not be liable for dilapidations arising from (a) the ordinary action of the elements [*Terrell v. Murray*, p. 644, *post*] or (b) wear and tear caused by reasonable user of the premises by persons using them: [*Davies v. Davies*; *Joyner v. Weeks*; *Ebbetts v. Conquest*].”

The remarks of Mr. Strachan as to the “wear and tear” exception at 31 C. L. T. p. 929, should be noted.

The leading case on the subject is *Lister v. Lane & Nesham* [1893] 2 Q. B. 212; 62 L. J. (Q. B.) 583, where the Court of Appeal held that if there be a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in deciding whether the covenant has been broken. And a tenant who enters an old house is not bound to leave it in the same state as if it were a new one. If the house is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the covenant to repair. Nor will an express covenant to repair and to “uphold, maintain and keep the premises” cover defects caused by the natural operation of time and the elements upon a house the original construction of which is faulty.

But cases like *Lister v. Lane* “must be rare”: 31 C. L. T. p. 929.

Under an agreement to keep a house in good tenantable repair, and so leave it at the expiration of the term, the tenant’s obligation is to put and keep the premises in such repair as, having regard to the age, character

and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. Under this contract the tenant must, if the premises are out of repair when he takes them, put them into good tenantable repair: *Proudfoot v. Hart* (1890) 25 Q. B. D. 42; 59 L. J. (Q. B.) 389 [C. A.].

A covenant to keep old premises in repair, and to leave them in repair at the end of the term, means that the lessee will, if necessary, put them into repair, for otherwise they cannot be left in repair pursuant to the covenant: *Payne v. Haine* (1847) 16 M. & W. 541; *Easton v. Pratt* (1863) 2 H. & C. 676; 33 L. J. (Ex.) 233.

Where a very old house is demised, with the usual covenants to repair and leave in repair, it is not meant that the house should be restored in an improved state, or that the consequences of the action of the elements should be averted; but the tenant has the duty of keeping the house in the same state in which it was at the time of the demise by the timely expenditure of money and care: *Gutteridge v. Munyard* (1834) 7 C. & P. 129; 1 Moo. & R. 334; and see *Miller v. Burt* (1918) 63 S. J. 117.

Where a tenant agrees "to put the premises in habitable repair," he is to put them in a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them: *Belcher v. McIntosh* (1839) 8 C. & P. 720; 2 Moo. & R. 186, 189.

See also *Westacott v. Hahn* [1918] 1 K. B. 495; 87 L. J. (K.B.) 555; *Jones v. Joseph* (1918) 87 L. J. K. B. 510.

In *Redmond v. Dainton* (1920) 89 L. J. (K. B.) 910, a tenant was, under his covenant, held liable to restore part of the premises destroyed by a German bomb: *Paradine v. Jane* (1647) Aleyn 26, applied.

### *Rebuilding the Whole Subject-matter.*

"If a house falls down by mere old age, the tenant is not bound to put up a new one. If it falls down by the fault of the tenant it is otherwise": per *Alderson*, B., in

*Belcher v. McIntosh* (*ante*); *Telfer Bros. v. Fisher* (1910) 15 W. L. R. 400; 3 Alta. L. R. 423.

If the destruction of a building by a tenant be wilful or negligent, he is liable in a civil action, but not for an injury to the premises resulting from the use of them in a reasonable and proper manner, having regard to the class of tenement to which they belong: *Saner v. Bilton, Manchester Bonded Warehouse Co., Ltd. v. Carr*, noted at p. 618, *ante*.

### *Destruction by Fire, or Tempest.*

If a lessee covenant to repair and keep in repair the demised premises during the term (not saying "damage by fire excepted" or to that effect), he must rebuild them if burnt down by accident, negligence, or otherwise: *Bullock v. Dommitt* (1796) 6 T. R. 650; *Digby v. Atkinson* (1815) 4 Camp. 275.

And where the lessee's covenant to repair contains an express exception of damage by fire and tempest whereby he is exonerated from rebuilding, it by no means follows that the landlord is bound to rebuild or repair in the event of loss or damage by fire or tempest without an express covenant by him to that effect: *Weigall v. Waters* (1795) 6 T. R. 488.

Though an exception of fire in a lessee's covenant to repair will relieve him from the obligation to repair where the damage has been occasioned by fire, it does not cast the onus of repairing upon the lessor during the term: *Broom v. Preston*, Sup. Ct. Newfoundland 491.

Nor will a covenant for quiet enjoyment have that effect: *Brown v. Quilter* (1764) Ambler 619.

Where a lessee of a wharf is bound to repair, "reasonable wear and tear and accidents by fire and tempest excepted," damage from ice forced against the wharf by a high wind is not caused by a "tempest" so as to excuse the lessee from the obligation to repair: *Thistle v. Union Forwarding Co.* (1880) 29 U. C. C. P. 76.

The provisions of the Short Forms Act are noted at p. 1103, *post*.

*Structural Alterations.*

It would seem that in Ontario the removal by a lessee of a fence on a farm from one place to another is not *per se* as a matter of law a breach of a covenant to repair and keep fences in repair. In any case if a lessor, knowing of such removal, accepts rent he would waive the forfeiture, if any: *Leighton v. Medley* (1882) 1 O. R. 207, but see *Pickard v. Wixon* (1866) 26 U. C. Q. B. 416 and *Wixon v. Pickard* (1866) 25 U. C. Q. B. 307.

On a covenant to keep premises in repair, it is a breach to pull them down either wholly or partially, even so far as to open doors in a wall: *Gange v. Lockwood* (1860) 2 F. & F. 115; *Doe d. Vickery v. Jackson* (1817) 2 Stark. 293.

A covenant by a lessee that he will during the term repair, uphold, support, maintain and sustain the brick walls to the demised premises belonging is broken if he pull down a brick wall which divides the court yard at the front of the house from another yard at the side of the house: *Doe d. Wetherall v. Bird* (1833) 2 N. & M. 285; 6 C. & P. 195, and *Holman v. Knox*, noted at p. 762, *post*.

A covenant to repair the external parts of the demised house comprises the partition wall between it and an adjoining house: *Green v. Eales* (1841) 2 Q. B. 225; 11 L. J. (Q. B.) 63.

The enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and keep in repair a dwelling-house, together with all such buildings, improvements and additions as should be executed, set up or made by the lessee; for the lease evidently contemplates such alterations, and allows them to be made: *Doe d. Dalton v. Jones* (1832) 4 B. & Ad. 126; 2 L. J. (K. B.) 11.

In *Straus Land Corporation, Ltd. v. International Hotel Windsor, Ltd.* (1918) 15 O. W. N. 10 [Falconbridge, C.J.K.B.], reversed in part (1919) 45 O. L. R. 145; 15 O. W. N. 411; 48 D. L. R. 519 [App. Div.] it appeared that plans and specifications had been agreed



upon for certain repairs to the front of the building. The defendants undertook to make a variation in the design, altering the front so as to make two entrances, and breaking up the interior into two shops. It was held that a claim for damages for breach of the covenant to repair seemed to be well-founded. The change made, it was admitted, could not lawfully have been made without the consent of the plaintiffs. The plaintiffs did consent to a certain defined change, but not to the change actually made. The defendants, then, were wrongdoers, and were not helped by the fact (if a fact) that the building was better as changed than it was before. The plaintiffs should have damages for the wrong done by the changes. The damages should be fixed at \$200, subject to the right of either the plaintiffs or defendants to take a reference at their own risk as to costs.

Lessees of a substructure who covenant sufficiently to maintain, uphold, support and keep the walls, piers, pillars, supports, etc., in good repair must maintain the original standard of strength; not at such lower standard as might be sufficient from time to time to carry and support the weights imposed: *Mayor and Corporation of London v. Great Western* (1910) W. N. 144.

An overhanging bay window was condemned by the London County Council as unsafe. The lessee, who had covenanted to repair, removed it and built a window in the main wall. The only practicable way of supporting the bay window would have been by columns from the ground. It was held that the lessee was not bound to build a new bay window or so to support the old which would have been the same thing: *Wright v. Lawson* (1903) 19 T. L. R. 98, affirmed 203 [C.A.]; 23 C. L. T. 98, 260.

### *Fixtures.*

The lessee's right to erect fixtures is restricted to such as will not diminish the value of the premises or increase the burden upon them as against the landlord, nor impair the evidence of title.

Though it must be observed that where, as under our system, title is preserved by surveys, registry, etc., it is difficult to see the force of the remarks in reference to impairing the evidence of title: see *Doherty v. Allman* (1878) 3 A. C. 709, per Lord O'Hagan, at p. 726.

Where a tenant erects fixtures for the purposes of his trade on the demised premises, and afterwards takes a new lease to commence at the expiration of the former one, and the latter lease contains a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease: *Thresher v. East London Waterworks Co.* (1824) 2 B. & C. 608; 2 L. J. (O. S.) (K. B.) 100.

See p. 835, *post*.

### *Painting.*

Under a covenant that the tenant "should and would substantially repair, uphold and maintain a house," he is bound to keep up the inside painting: *Monk v. Noyes* (1824) 1 C. & P. 265. As to the circumstances under which painting, papering and whitewashing must be done, see *Proudfoot v. Hart* (*ante*, p. 634).

A lease contained the usual covenants to keep the premises in repair, and to paint the inside every seven years and the outside every five years. The lessor served a notice to repair defective plastering and cracks in the walls and ceilings, also holes in the walls caused by driving in nails; and it was held that the lessee was not called upon to do more than paint the inside every seven years, and could not in the meantime be compelled to fill up the holes in the wall: *Perry v. Chotzner* (1893) 9 T. L. R. 488.

### *Fences.*

It is so notoriously the duty of the actual occupier of lands to repair the fences, and so little the duty of the landlord, that without any agreement to that effect the landlord may maintain an action against his tenant for not so doing upon the ground of the injury done to his

inheritance: *Cheetham v. Hampson* (1791) 4 T. R. 318. But this rule does not apply in the case of tenants at will: [see p. 629, *ante*].

The obligation to preserve the boundaries may be enforced during the continuance as well as at the end of the term. If, for instance, a ditch forming the boundary is filled up, the Court has jurisdiction to ascertain the boundary during the term: *Spike v. Harding* (1878) 7 Ch. D. 871; 47 L. J. (Ch.) 323. It is questionable whether this obligation applies in its full extent where there is a system of registry, etc.: see *Doherty v. Allman* [p. 617, *ante*].

The provisions of the Criminal Code, ss. 530 and 531, should also be referred to.

#### *What Excuses Performance of the Covenant.*

As to the authority necessary to excuse a breach of a covenant to repair, see *Pickard v. Wixon* (1866) 24 U. C. R. 416.

“As to the claim for damages for non-repair, it is shown that a number of windows were broken by a storm, but that is not an answer to a claim under a covenant to repair from which such damages are not specifically excepted. (See *Sharp v. Milligan* (No. 2) (1857) 23 Beav. 419).” Per Scott, J., in *Beckford v. Brandle* (1919) 50 D. L. R. 450, at p. 451 [*Alta.*].

Where a lessee covenants to repair, and that on default the lessor may execute the repairs and sue for the sum expended, it is no defence for the lessee to show that the dilapidations so repaired were caused and procured by the lessor wilfully, maliciously and in the dead hour of the night; but conduct of this kind may be the subject of a cross-action or counter-claim: *Kelly v. Moulds* (1863) 22 U. C. R. 467.

#### *No Notice is Necessary.*

Where the tenant's covenant to repair contains no provision as to notice, the landlord is under no obligation to give the tenant notice to repair before doing the

repairs himself and proceeding to recover the cost: *Manchester Bonded Warehouse Co. v. Carr* [p. 618, *ante*], followed; *Telfer Bros. v. Fisher* (1910) 15 W. L. R. 400; 3 Alta. L. R. 423.

*The Time During which the Covenant Operates.*

A lessee who has covenanted to repair and keep in repair the demised premises during the term must have them in repair at all times during the term. If they are at any time out of repair he is guilty of a breach of covenant: *Luxmore v. Robson* (1818) 1 B. & Ald. 584.

A covenant to repair the buildings demised, and to rebuild them if necessary, compels the tenant always during the term to keep them in good repair, and a deduction in damages for their age has been disallowed: *Doe d. Worcester Trustees v. Rowlands* (1841) 9 C. & P. 734.

Where a lease contains a covenant to execute specific repairs in a particular year, if the lease shall be then subsisting, the obligation to perform the covenant attaches as soon as the year begins, and the fact that the lease is determined by the lessee by notice expiring before the end of the year does not relieve the lessee of his obligation to perform the covenant: *Kirklington v. Wood* [1917] 1 K. B. 332; 37 C. L. T. 313.

A lease of a farm contained a covenant by the lessee to repair buildings erected or to be erected and to leave the premises in good repair on the termination of the lease. On 26th January the lessee agreed to surrender as of the 1st of April following. On 2nd February the landlord agreed to sell the farm to the plaintiff and shortly thereafter the defendant tore down and removed a corn crib which he had erected. The conveyance to the plaintiff was made March 1st. In an action for damages for removal and conversion of the corn crib the defendant unsuccessfully contended that he had to leave only the buildings in repair on the date of the deed to the plaintiff, namely, March 1st, and the plaintiff was given damages equal to the amount necessary to restore the

buildings to the conditions covenanted for: *Lucas v. McFee* (1909) 12 O. W. R. 939; 29 C. L. T. 98.

Where a lease containing a covenant to repair is assigned the assignee must keep the premises in the repair in which they were when the demise was made, not at the time of the assignment to him; and if they are not in repair at that time the owner may recover damages from the assignee: *Plummer v. Johnson* (1902) 18 T. L. R. 316; 22 C. L. T. 136.

### *The Covenant to Repair on Notice.*

The covenant to repair generally, and to repair within three months after notice in writing, are independent covenants and where a notice had been given to repair, the former covenant may be enforced even before the expiration of the notice: *Doe d. Moorecraft v. Meux* (1825) 4 B. & C. 606; 7 D. & R. 98; 1 C. & P. 346; *Thistle v. Union Forwarding Co.* (1880) 29 U. C. C. P. 76.

And where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs by giving six months' notice in writing, it was held that these were two distinct and separate covenants, the former of which was not qualified by the latter: *Wood v. Day* (1817), 7 Taunt. 646; 1 Moo. 389. But where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter: *Horsefall v. Testar* (1817) 7 Taunt. 385; 1 Moo. 89; 4 C. B. N. S. 551.

The covenant to repair after notice will be qualified by an exception in the general covenant. A lease of a wharf or pier for eight years, dated 7th of May, 1874, contained covenants by the lessees to keep the same in good and sufficient repair, "reasonable wear and tear and accidents by fire and tempest excepted," and the

same so repaired to deliver up at the end of the term, and also to repair after notice in writing, but without the above exceptions. It was held that these were not separate and independent covenants, but that the covenant to repair after notice was subject to the same exceptions as were contained in the general covenant: *Thistle v. Union Forwarding Co.* (1880) 29 U. C. C. P. 76.

A notice to repair is not effectual if served on the tenant after he has parted with his interest, although the lessor was ignorant of the transfer of the term when he served the notice: *Crawford v. Bugg* (1886) 12 O. R. 8.

### *The Covenant to Leave in Repair.*

In a lease for years there was contained, after the usual covenant to yield up the same in good repair, the following proviso: "provided always, that nothing herein contained shall be deemed or taken or construed to be deemed or taken in any way to compel the lessee, his executors, administrators or assigns to give up the buildings at the expiration hereof, which are all wooden and liable to decay, in as sound and good a state as they now are, but such buildings are not to be wilfully or negligently wasted or destroyed, necessary repairs, however, for the preservation of the said buildings to be done and performed by the said lessee at his own proper cost and charge." It was held that the words recited, though somewhat in the form of a proviso, constituted a covenant not being in the nature of a defeasance, but an express undertaking by the lessee himself to repair, and that the lessee was not entitled to delay repairing until the end of the term; but that the words "necessary repairs to be done, etc., by the said lessee," following the covenant already recited, undoubtedly showed that the repairs intended were such as were necessary to prevent the buildings going to destruction, and that the moment such necessity existed, and the tenant failed to repair, that moment the covenant was broken: *Perry v. Bank of Upper Canada* (1866) 16 U. C. C. P. 404.

A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paled and fenced,

was held to have been broken when the pavement was out of repair and the glass in the windows broken: *Pyot v. St. John* (Lady) (1613) Cro. Jac. 329.

Where a tenant of a farm covenanted "well and substantially" to repair and "keep in good substantial repair," and so "well and substantially repaired" to yield up at the end of the term; it was held that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state: *Brown v. Trumper* (1858) 26 Beav. 11.

On a covenant, as often as necessary, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted; the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, etc., and not to re-paint: *Scales v. Lawrence* (1860) 2 F. & F. 289.

The lease of a farm and mill provided that the lessee should keep and leave the messuages and buildings in good and substantial repair, and the tenant was held liable to repair the mill wheel: *Openshaw v. Evans* (1884) 50 L.T.156.

Under an agreement for a lease for five years of a dwelling house, the tenant was to leave the house in tenantable repair, and it was held that the tenant was not bound to paper and paint and leave the house in the same condition as when he took it, but only liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting: *Crawford v. Newton* (1887) 36 W. R. 54 [C. A.].

A piano hoist was put in by a tenant with his landlord's permission. *Boyd, C.*, held that as it was left on the premises and became a fixture it was not competent for the landlord to remove it and have the building restored to its former position and to seek to charge the expense to his tenant as if the tenant had committed a breach of the covenant to leave the premises in good repair, because he had not restored them to their original

condition: *Nelles v. McNee* (1906) 7 O. W. R. 158; 26 C. L. T. 219.

A covenant to yield up in repair all buildings and improvements erected during the term has been held to be broken by the removal of a verandah, the lower part of which was attached to posts fixed in the ground: *Penry v. Brown* (1818) 2 Stark. 403; but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to yield up in repair all buildings to be erected during the term does not extend to them: *Naylor v. Collinge* (1807) 1 Taunt. 19.

A lessee's covenant to leave the premises in repair at the end of the term will not be modified by the fact that owing to changes in the surrounding property the house has so far altered in value since the commencement of the lease that it would be as valuable for letting purposes if some of the repairs required by the covenant according to its strict meaning were either omitted or executed at a cheaper rate than is usual under such a covenant: *Morgan v. Hardy* (1886) 17 Q. B. D. 770; reversed on another point (1887) 18 Q. B. D. 646 [C. A.].

### *The Covenant to Deliver Up.*

A covenant to deliver up the premises in as good condition . . . as at the date of the lease, reasonable wear and tear excepted, means that the tenant is bound to deliver up the premises in as good condition as they were at the beginning, subject to the following exceptions, viz., dilapidation caused by friction of the air, dilapidation caused by exposure, and dilapidation caused by ordinary use: *Terrell v. Murray* (1901) 17 T. L. R. 570.

This statement was adopted in *Buttimer v. Bettz* (1914) 26 W. L. R. 705; 6 W. W. R. 22 (B. C.), by Grant, Co.J., who held that a tenant who had covenanted to repair, reasonable wear and tear, and damage by fire, lightning, tempest and *structural defects* excepted, was not bound to renew worn out and structurally defective



works such as water closets and drains: *Lister v. Lane and Nesham* [1893] 2 Q. B. 212, followed; *Howe v. Botwood* [1913] 2 K. B. 387, where there was an express covenant on the part of the landlord to keep the exterior of the building in repair.

An informal lease made in the Yiddish tongue provided that the tenant who was to receive the premises "in the best condition" was to "give up the house in the same condition and repairs." In an action by the landlord for breach of this covenant, it was held that he was entitled to an allowance for ordinary wear and tear: *Gutteridge v. Munyard* (1834) 1 Moo. & R. 334, explained in *Lurcott v. Wakeley & Wheeler* [1911] 1 K. B. 905 [C.A.], referred to and the latter case followed: *Bornstein v. Weinberg* (1912) 27 O. L. R. 536; 4 O. W. N. 534; 8 D. L. R. 752 [D. C.].

This subject is further discussed under Article 126, p. 807, *post*, where the question of delivery up at the end of the term is considered. "Fixtures" are dealt with under Article 127, pp. 823, *et seq.*, *post*, and see p. 1111.

### COMMENCEMENT OF LIABILITY.

ARTICLE 103.—In fixing liability on a covenant to repair, regard must be had to the state of the premises at the time the lease is executed or the covenant begins to operate.

[Authorities: *Walker v. Hatton* (1842) 10 M. & W. 249; *Perry v. Bank of Upper Canada* (1886) 16 U. C. C. P. 404; *Houston v. McLaren* (1888) 14 A. R. 103].

A lessee is not liable for breaches of covenant to repair committed before the execution of the lease by the lessor, although subsequent to the day from which the habendum states the term is to commence: *Shaw v. Kay* (1847) 1 Exch. 412.

Where the lease was dated 31st of August, to take the premises from the 29th of September following, there being at the time another tenant in possession, and the new tenant not taking possession until the 29th Septem-

ber, an agreement to leave the premises "in the same state as they now are" and to take back fixtures in "as good a condition as they now are," was held to refer to the state of the premises on the 29th September: *White v. Nicholson* (1842) 4 M. & G. 95; 11 L. J. (C. P.) 264.

A covenant to repair contained in an *under-lease*, though in the same words as the covenant in the original lease (except as to names), has not the same legal effect and meaning, because of the different ages and conditions of the premises at the respective times of the lease and under-lease. The reason is that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate: *Walker v. Hatton* (*supra*).

## REMEDIES FOR BREACH OF COVENANT.

ARTICLE 104.—Where a tenant covenants to repair the landlord's remedy at law on a breach of the covenant is an action for damages, and damages may be recovered in an action for waste: but by agreement of the parties there may be a proviso for re-entry on a breach of a covenant to repair or on waste being committed; an injunction will be granted to stay waste: the covenant to repair will not be specifically performed.

[Authorities: *Infra, Passim*].

It has already been seen [p. 605, *ante*), that a landlord has no right, without some express power in his lease (or a covenant to repair from which a right may be implied), to enter on the demised premises during the term to view the state and condition thereof or the waste or dilapidations.

### *The Action for Damages.*

[I.] For Breach of the General Covenant to Repair.

At one time it was erroneously supposed that only nominal damages could be recovered in an action com-

menced during the term: see *Marriott v. Cotton* (1848) 2 C. & K. 553.

But this rule was disapproved of in *Perry v. Bank of Upper Canada* (1886) 16 U. C. C. P. 404, and overruled in *Smith v. Peat* (1853) 9 Exch. 161.

A covenant to keep premises in repair is a continuing one: *Coward v. Gregory* (1866) L. R. 2 C. P. 153; 36 L. J. (C. P.) 1; and, if not complied with, the lessor or his assigns may during the term recover damages commensurate with the injury to the reversion: *Smith v. Peat* (*supra*); *Turner v. Lamb* (1845) 14 M. & W. 412.

Instead of suing for damages the lessor may, of course, bring an action to recover possession on any proviso for re-entry applicable to the breach of covenant: *Bayliss v. Le Gros* (1858) 4 C. B. N. S. 537; *Bennett v. Herring* (1857) 3 C. B. N. S. 370.

Damages can only be recovered for breaches committed before the termination of the tenancy: *Ex parte Glegg* (1881) 19 Ch. D. 7; *Ex parte Dyke* (1882) 22 Ch. D. 410; *Beckford v. Brandle* (1919) 50 D. L. R. 450 [Alta.—App. Div.].

### *The Measure of Such Damages.*

Where an action for breach of the covenant to repair is brought by a lessor against his lessee during the currency of the tenancy, the true measure of damages is not the sum required to put the premises into repair, but the loss to the landlord measured by the depreciation in the salable value of his reversion. At the end of the term the landlord is entitled to recover the amount necessary to put the premises in repair, and where there has been a recovery during the term but no repairs have been executed, the damages at the end of the term would be the amount necessary to put the premises in repair less the amount before recovered, and a sum for such depreciation as would have accrued had the repairs been executed during the term: *Henderson v. Thorn* [1893] 2 Q. B. 164; 62 L. J. (Q. B.) 586.

In *Atkinson v. Beard* (1861) 11 U. C. C. P. 245, it was held that, although a lease has many years to run, the reversioner, in suing for non-payment of rent and non-repair pursuant to a covenant therein is not restricted to nominal damages, and the measure of damages is the amount to which the reversion is injured by the premises being out of repair.

But some damage to the reversion must be shown: *Williams v. Williams* (1874) L. R. 9 C. P. 659.

Where it was proved that the damage to the reversion by reason of the lessee's omission to repair was \$651, the estimate covering all injury up to the time of the trial, and the jury gave a verdict for \$400, the Court refused to grant a new trial on the ground of excessive damages, there being no misdirection, the Judge not being asked to direct the jury to find in exact terms the actual damage sustained by the reversion, and no affidavit being filed to show that the damages were excessive: *Perry v. Bank of Upper Canada* (1886) 16 U. C. C. P. 404.

The damages recoverable for a breach of the covenant to repair are confined to those sustained by the covenantor and his assigns from the deprivation of the proper use of the demised premises by the default of the covenantor: *Philips v. St. John Water Co.* (1858) 9 N. B. R. 24.

When a lessee has entered into a covenant to repair, and afterwards the premises are expropriated by a railway company, the lessor will be entitled to damages for any non-repair existing on the premises before the railway obtain a conveyance and enter into possession, and the proper measure of damages is the amount by which the reversion had deteriorated at the date of the cesser of the lessee's interest: *Mills v. Guardians East London Union* (1872) L. R. 8 C. P. 79; 42 L. J. (C. P.) 46; 27 L. T. 557.

If there be a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific amount against fire, on their being burnt down, the tenant's liability on the former covenant is not

limited to the amount to be insured under the latter covenant: *Digby v. Atkinson* (1815) 4 Camp. 275.

Where a lessor agreed to fence the premises, the measure of damages for neglect to do so was held to be what it would have cost the lessee to lease another piece of land fenced: *Clarke v. Murray* (1877) M. R. Temp. Wood 119.

The measure of damages for breach of a covenant by a lessor to dig ditches is the difference between the rentable value of the demised premises with the covenant performed, that is with the improvements made, and the value without such improvements: *McEwen v. Dillon*, (1886) 12 O. R. 411.

See also *In re Driscoll: Driscoll v. Driscoll* [1918] 1 Ir. R. 152.

#### *When Nominal Damages are Given.*

The lessor is entitled to nominal damages, although the lessee expend money after action in repairing the demised premises: *Morony v. Ferguson* (1874) 8 Ir. R. C. L. 551. But in an action by the lessee against the assignee of a lease on a breach of covenant in the deed of assignment to keep the demised premises in repair, it was held, in the absence of actual loss sustained, the lessee could only recover nominal damages, although the lessor had commenced an action against him for breach of the covenant contained in the lease: *Beattie v. Quirey* (1876) 10 Ir. R. C. L. 516; see also *Metge v. Kavanagh* (1877) 11 Ir. R. C. L. 431.

#### *Where the Covenant is a Continuing One.*

Where the covenant is a continuing one, a recovery in one action will be no bar to a subsequent breach; but where it is not a continuing one the recovery in one action will be a bar, and in such case damages must be assessed once for all: *Cole v. Buckle* (1868) 18 U. C. C. P. 586.

So a breach of a continuing covenant cannot be waived by acceptance of rent: see p. 741, *post*.

A covenant by a lessor to repair fences *on or before a certain day* is not a continuing covenant, and damages

must, therefore, be assessed once for all. The proper measure of damages in such case is the amount by which the beneficial occupation of the premises during the term is lessened: *Cole v. Buckle* (*supra*).

Where the lessor covenants to *put* the whole of the demised premises into repair, and damages are once recovered in respect of that breach, it will be a bar to another action against the assignee of the lessor, the breach having been by the latter: *Coward v. Gregory* (1866) L. R. 2 C. P. 153.

But it will be no answer to a covenant to keep portions of the premises in repair that there has been a recovery against the lessor in an action for non-repair; for the breach is a continuing one, and the fact that the further repairs might have been unnecessary if the lessee had spent the money recovered in repairs is only evidence in mitigation of damages: *Coward v. Gregory* (*supra*).

#### *Cases of Sub-leases.*

A *sub-lessor* cannot recover substantial damages against his sub-lessee on a general covenant to repair where no damage is done to his reversion: *Williams v. Williams* (1874) L. R. 9 C. P. 659. In an action for breach of covenant in an under-lease to repair whereby the plaintiff's term in the premises was forfeited, the plaintiff cannot recover the value of his term if the superior landlord has brought his ejectment for the non-repair, as well as for breach of other covenants not contained in the under-lease, if it is not proved that the forfeiture was caused by the acts of the defendant; but he may recover the amount of dilapidations at the time of the ejectment, though his own term is determined: *Clow v. Brogden* (1840) 2 M. & G. 39. He may recover substantial damages for non-performance of the covenant to repair, etc., contained in the under-lease, notwithstanding both he and the defendant have been ejected by the superior landlord for non-payment by himself of the rent reserved in the original lease: *Davies v. Underwood* (1857), 2 H. & N. 570. In covenant on an under-lease for

not repairing, in which the covenants differed from those in the original lease, and in which there was no covenant to indemnify the lessee against breach of covenants in the original lease, the lessee cannot recover the costs of an action brought against him by the original lessor for the mere dilapidations, which he might have paid for before that action was commenced: *Penley v. Watts* (1841) 7 M. & W. 601; 10 L. J. (Ex) 229; *Logan v. Hall* (1847) 4 C. B. 598.

The lessee of a term for 61 years granted an under-lease for the whole term less ten days. There was no covenant by the under-lessee to indemnify his lessor against liability to his superior landlord, but the under-lessee was liable under the lease to himself to deliver up the premises in good repair to his own landlord at the end of the term. Before the term expired an action was brought by the under-lessee against assignees of the under-lessee on covenants in the under-lease to repair the premises, to keep them in repair and to deliver them up in repair to the lessor at the end of the term. The under-lessees knew that their lessor was liable to his lessor, and the Court of Appeal held that the measure of damages was the sum it would cost to put the premises in proper repair, allowing a discount for the period the sub-lease had yet to run, or the difference between the value of the reversion with the covenant to repair performed, and its value with that covenant not performed: *Ebbetts v. Conquest* [1895] 2 Ch. 377; 11 T. L. R. 454 [C. A.] [1896] A. C. 490, following *Hadley v. Baxendale* (1854) 9 Exch. 341, and see *Ellis v. Torrington (Viscountess)* (1920) 89 L. J. (K. B.) 369 [C. A.].

## [II.] For Breach of Covenant to Repair on Notice.

In 1807 a lease was granted to F. containing a general covenant to repair, a covenant to repair within three months after notice and a proviso for re-entry on breach. The assignees of the lessee granted an under-lease with similar covenants, except that the notice was to be a two months' notice. In 1872 the reversioner served a notice to repair pursuant to the lease of 1807. The assignees

on the 20th of March, 1873, served the under-lessee with a notice "to repair the premises in accordance with the terms of his lease," and to avoid a forfeiture the assignees entered and did the repairs themselves: and it was held that they could not sue the under-lessees on their covenant to repair before the expiration of the two months, nor were they entitled to recover substantial damages on the general covenant to repair (which did not require notice), for no damage was done to their reversion: *Williams v. Williams* (1874) L. R. 9 C. P. 659; 43 L. J. (C. P.) 382.

### [III.] For Breach of Covenant to Deliver Up.

Where a lessee covenants to deliver up the premises in good repair at the end of the term, but fails to do so, the lessor is entitled not only to the cost of putting them in repair, but also to compensation for the non-user of the premises while undergoing repairs afterwards: *Birch v. Clifford* (1891) 8 T. L. R. 103; see also *Joyner v. Weeks* [1891] 2 Q. B. 31; 60 L. J. (Q. B.) 510 [C. A.]; *Wood v. Pope* (1835) 6 C. & P. 782; 1 Bing. N. C. 467. *Buscombe v. Stark* [1917] 1 W. W. R. 204; 23 B. C. R. 155.

If the lessee does not deliver up the premises in good repair at the end of the term according to his covenant, the lessor has then a vested right of action for compensation, which cannot be affected by the fact of his proceeding to make structural alterations in the premises after the end of the term: *Inderwick v. Leech* (1884) Cab. & El. 412.

At the expiration of a lease of premises which the lessee had covenanted to yield up in repair, there was a clear breach of the covenant, but the reversioner had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises; it was held that as the agreement to pull down, etc., was not binding, the reversioner might sue and recover substantial damages, his right vesting when the lease expired and not



being affected by an assignment of his interest before action: *Rawlings v. Morgan* (1865) 18 C. B. (N. S.) 776; 34 L. J. (C. P.) 185.

Damages are not recoverable until the term has expired: *Randolph v. Randolph* (1908) 4 E. L. R. 17; 3 N. B. Eq. 576.

*An Action for Waste will Lie Even if there be an Express Covenant by the Lessee to Repair.*

An action for waste will lie notwithstanding an express covenant to repair, but there must be what would constitute waste, a mere breach of covenant not amounting to waste not being sufficient. But to maintain such action the plaintiff must have a vested interest in the reversion at the time of waste committed, so that the claim, if any, where the plaintiff is assignee of the reversion, must be for waste committed after the reversion is acquired: *Crawford v. Bugg* (1886) 12 O. R. 8.

But no action can be brought on the implied covenant to use the premises in a tenant-like manner where there is an express covenant in reference to the matter: *Crawford v. Bugg* (*supra*).

Where there is an express covenant or agreement to do repairs, or not to commit waste, the remedy must be upon that, and not for the breach of any implied contract to use the demised premises in a tenant-like manner: *Standen v. Christmas* (1847) 10 Q. B. 135; *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836 [C. A.].

*Injunction to Restrain.*

To obtain an injunction against a defendant on the ground of waste, the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance; if it improves the value of the land it is not waste: *Meux v. Cobley* [1892] 2 Ch. 253; 61 L. J. (Ch.) 449; approving of *Doherty v. Allman* (1878) 3 A. C. 709; 39 L. T. 129 and *Jones v. Chappell* (1875) L. R. 20 Eq. 539; 44 L. J. (Ch.) 658.

Under the Judicature Acts, if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise; or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

### *The Statute.*

It seems that where a lessee commits acts of waste for which damages merely nominal would be given, the Court will not grant an injunction against him if it appear that he does not contemplate committing any further waste, nor assert a right to commit it: *Doran v. Carroll* (1860) 11 Ir. Ch. R. 379.

A mortgagee of a term of years being in possession of the mortgaged estate will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have the consent of the reversioner to what he is doing: *Chisholm v. Sheldon* (1850) 1 Grant 318.

### *The Measure of Damages.*

The implied covenant by a tenant not to commit waste is not, with regard to the measure of damages for the breach of it, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore the measure of damage is not necessarily the sum which it would cost to restore the property to its condition before the waste, but the diminution in the value of the reversion, less a discount for immediate payment: *Whitham v. Kershaw* (1885) 16 Q. B. D. 613; 54 L. T. 124 [C. A.]. In a very gross case "vindictive damages" might be given: *Id.*, per Bowen, L.J.

Though an act complained of is technically waste the reversioner is not entitled even to damages, unless injury is done to the inheritance, and where injury is done, if the damage is small the remedy is not by injunction but awarding damages: *Jones v. Chappell* (1875) L. R. 20 Eq. 539; *Doherty v. Allman* (1878) 3 A. C. 709, per Lord Cairns, 722; Lord Blackburn: *Meux v. Cobley* [1892] 2 Ch. 253, cited; *Klees v. Dominion Coat and Apron Co.* (1904) 3 O. W. R. 841; (1905) 6 O. W. R. 200 [C.A.].

### *Right of Re-entry.*

Unless this right of re-entry is given by the lease or by some statute, as in Alberta and Saskatchewan, it does not exist—it is not the landlord's "as of course":—*Fetherston v. Bice* [1917] 1 W. W. R. 224 (Walsh, J., at p. 225) [Alta.].

Where there is a proviso for re-entry, if the lessee commit waste to the value of 10s., the waste contemplated must be waste producing an injury to the reversion, and it is a question for the jury under all the circumstances whether such waste has been committed: *Doe d. Darlington (Earl) v. Bond* (1826) 5 B. & C. 855.

This subject is further discussed at pp. 713 *et seq.*, *post.*

## LIABILITY TO THIRD PARTIES.

ARTICLE 105.—Where premises are in such a condition as to be dangerous to passers-by and particular damage results to a person so passing, the tenant is liable: (1) whether he has contracted to repair or not if the premises became dangerous after the date they were let; (2) if the landlord has not contracted to repair.

This Article is the converse of Article 97 dealt with at p. 590, *ante*, and the authorities will be found there.

A landlord is not liable in respect of a nuisance created by his tenant during the term: *R. v. Pedley* (1834) 1 A. & E. 822; 3 N. & M. 627.

Where there is an express contract by the lessor to repair and a third person is injured by the want of repair, it is probable that both lessor and lessee would be liable, *prima facie* the lessee would be so liable: *Payne v. Rogers* (1794) 2 H. Blac. 349;.

In *McCallum v. Hutchison* (1857) 7 U. C. C. P. 508, the landlord and tenant were both held liable in damages for a nuisance created by the landlord in the house, and continuing to be used by the tenant while occupying it. If the construction of the article by the landlord was such that it could not be used without creating a nuisance, he should be held liable. But the case was treated as if both were in possession. Although by a letting the landlord authorizes the continuance of a nuisance already existing, still if the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the act or neglect of the tenant which creates the nuisance.

### ESCAPING SUBSTANCES.

ARTICLE 106.—Where by the negligent Act of a tenant of one part of the demised premises or of his servants or agents acting in the scope of their employment, dangerous matter is permitted to escape from his premises on to the premises of a tenant of another part of the same property, the first tenant is liable for the damage resulting.

[Authorities: *Powley v. Mickleborough* (1910) 21 O. L. R. 556 [Div. Ct.]; *Ruddiman v. Smith* (1889) 60 T. L. R. 708.

In *Powley v. Mickleborough* (*supra*), the facts were that through the negligence of the defendants water from a tap left open escaped from their premises on to the premises of the plaintiff through a crack in the concrete floor and damaged the plaintiff's goods. The defendants were held liable.

The onus is on the person from whose premises the dangerous substances escaped to prove he was not negligent: *Powley v. Mickleborough* (*supra*); *Childs v. Lissaman* (1904) 23 N. Z. L. R. 945.

In *Holgate v. Bleazard* [1917] 1 K. B. 443; 86 L. J. K. B. 270; 37 C. L. T. 385, the question arose as between tenants of adjoining farms rented from the same landlord. Each tenant had covenanted with the landlord to keep the fences repaired. The boundary fence was out of repair and defendant's horses strayed through and injured plaintiff's colt. It was held that the rule in *Fletcher v. Rylands* (1866) L. R. 1 Ex. 265, and *Bullen v. Leake*, 3rd Ed. p. 329; 7th Ed. p. 311, "the general rule is that the owner of cattle is bound to take care that they do not trespass on the land of others" applied, and that the qualification that the owner upon whose land the trespass took place might be bound to maintain a fence for the benefit of the adjoining owner did not apply in such a case as this where the adjoining tenant had merely covenanted with his landlord that he would repair it. There was an obligation on the defendant to keep his cattle from straying and he was not allowed to take advantage of the plaintiff's breach of his contract with his landlord.

See also *Hydro Electric Power Commission of Weland v. Hill* (1920), 19 O. W. N. 45 [Orde, J.], a case of a nuisance created by a tenant of one floor of a building affecting a tenant of another floor.

This subject is discussed at pp. 581, *et seq.*, *ante*,

## CHAPTER XIII.

### DETERMINATION OF TENANCIES.

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## MANNER OF DETERMINATION.

ARTICLE 107.—A tenancy may be determined in any of the following ways: [I] by surrender—express or implied; [II] by merger; [III] by forfeiture; [IV] in the case of a periodic tenancy for an indefinite period by notice to quit; [V] in the case of a tenancy for a definite period by the expiration of the term; [VI] in the case of a tenancy for life by the death of the person for whose life it is to endure; [VII] in the case of a tenancy at will or at sufferance in the various ways noted below.

[Authorities: These appear in the following Articles.]

*Destruction of Subject Matter.*

In considering the question of abatement of rent, Article 41, pp. 285 *et seq.*, this subject has been dealt with.

The statutes and provisions of the Short Forms leases are also there referred to and the Short Forms provisions are discussed at length at pp. 1101 *et seq.*, *post.*

The surrender of possession under the provisions of R. S. O. 1914, c. 155, s. 34, noted at p. 452 (*ante*), shall by s. 34 (2) be a determination of the tenancy.



## SURRENDER.

ARTICLE 108.—A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may drown by mutual agreement; it may be [express] — that is *by act of the parties*—or [implied]—that is *by operation of law*.

[Authorities: Co. Litt. 337*b*; Shep. Touch. 300; 13 Encyc. of the Laws of England, 731; Halsbury, vol. 18, p. 546.]

A surrender, properly taken, is the yielding or delivering up of lands or tenements and the estate a man hath therein, unto another that hath a higher and a greater estate in the same lands or tenements: Shep. Touch. 300.

A surrender differs from a release in this respect, that the release operates by the greater estate's descending upon the less,—a surrender is the falling of a less estate into a greater: Butler's Note to Co. Litt. 337*b*; *Burton v. Barclay* (1831) 7 Bing. 745.

The party making the surrender is called the surrenderor, and the party to whom it is made the surrenderee.

The surrender may be of the whole or a part only of the demised premises: *Baynton v. Morgan* (1888) 22 Q. B. D. 74, but it must be of the *whole* interest or estate of the surrenderor in the actual premises surrendered: 2 Roll. Abr. 497 (*l*) 30; *Burton v. Barclay*, *supra*, at 757.

The estate or interest must be in possession or vested, for a right cannot be surrendered: Co. Litt. 338*a*. As to surrender of leases of future interests or to commence *in futuro*, see *post*, p. 664.

A lessee cannot surrender before he has entered on the premises, but once having entered, his assignee may surrender before entry: Bac. Abr. Leases and Terms of Years, s. 2, 2.

A lessee for a term of years to begin presently cannot before entry merge the term by a surrender, because till entry there is no term and no reversion wherein the

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possession may be merged; but if the lessee enter and assign his estate to another, such assignee may before entry surrender his term to the lessor, because by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by assignment transferred to the assignee, may without other entry be surrendered and drowned in the reversion: *Id.* (s. 2).

A tenant who had, for eight months, been in possession and paid rent under a verbal agreement to lease premises for a term of five years, got into financial difficulties and went with his lessor's agent to a trust company to make an assignment for creditors. He executed the assignment to the company and at the same time a surrender of his lease. The assignment was not accepted by the company—and so did not become effective—until the following day. It was held, reversing *Logie, J.* (1919) 7 O. W. N. 24; 49 D. L. R. 113, that the surrender preceded the making of the assignment, and was not a fraud upon the Assignments Act: *Bell v. Chartered Trust, etc. Co., Chartered Trust, etc. Co. v. Bell and Bursey* (1919) 46 O. L. R. 192; 17 O. W. N. 88; 49 D. L. R. 113; 50 D. L. R. 45 [App. Div.].

*“To him who has the immediate Estate in Reversion or Remainder.”*

To give a surrender legal effect, the surrenderee must have the immediate estate in remainder or reversion expectant on the estate of the surrenderor: *Co. Litt.* 337*b* and *Butler's* note thereon; a surrender must be to the immediate reversioner or to a party legally entitled under him: *Cornish v. Searell* (1828) 8 B. & C. 234. A lease for years is a grant of the reversion expectant on the determination of an existing shorter term if the lease is made to take effect *in presenti*. See *Edwards v. Wickwar* (1866) L. R. 1 Eq. 403; *Horn v. Beard* [1912] 3 K. B. 181.

The surrender may be made to the assignee of the reversion even where the assignor has reserved to him-

self the right to collect the rent, and has notified the lessee of this arrangement: *Southwell v. Scotter* (1880), 49 L. J. (Ex.) 356 [C.A.].

If A. let to B. for ten years, who lets to C. for five years, C. cannot surrender to A. by reason of the intermediate interest of B. But in such case B. may surrender to A., and afterwards C. likewise, because then his lease for five years is become immediate to the reversion of A.: Bac. Abr. tit. Leases (s. 2).

One joint tenant cannot surrender to another joint tenant, but he may grant, release or assign to him. One of two or more executors may alone surrender an estate or lease for years, which the executors have in right of their testator: Shep. Touch. 303.

An administrator *de son tort* of a lessee for years, whose lease was subject to a covenant for re-entry on rent being in arrear, agreed to give possession to the landlord on his waiving rent. Afterwards the administrator took out letters of administration, and it was held that the agreement with the landlord did not give the latter a right to possession, he having entered without any formal demand of the rent or regular surrender of the lease: *Doe d. Benjamin Howley v. Glenn* (1834) 1 A. & E. 49.

When a lessee who has paid rent sometimes to a trustee and sometimes to a *cestui que trust* gave up possession on the last day of the term, but before it was ended, to the person who had been trustee, and not to the party then having the legal title, it was held that as the act was equivocal it did not amount to either a surrender or a forfeiture: *Ackland v. Lutley* (1839) 9 A. & E. 879.

A surrender cannot be made to sequestrators, it must be to the lessor: *Cornish v. Searell*, *supra*.

### *Express Surrender.*

In this case the surrender occurs by the act of the parties, by an express agreement that a surrender shall be made. This is sometimes called a surrender in deed.

The proper words by which it should be made are

“surrender, give or yield up”: Shep. Touch. 306, but the word “surrender” is not necessary, the general rule that all documents should be construed so as to effectuate if possible the intention of the parties applying to surrenders as well as to other assurances: Smith’s Landlord and Tenant, 353; *Smith v. Mapleback* (1786) 1 Term R. 441.

The following are the requisites to an express surrender: (1) the surrenderor must have a vested interest in possession or remainder; (2) the estate of the surrenderor must be one that may merge in the estate of the surrenderee; (3) the estate of the surrenderor must be of a lower denomination than the estate of the surrenderee, or of the same and not of a higher denomination, so that the estate of the surrenderor may be drowned therein; therefore an estate for life cannot be surrendered to a person who has only an estate for years; (4) the surrender must be to him that hath the next immediate estate in remainder or reversion, so that there be no intervening estate coming between; (5) there must be a privity of estate between the surrenderor and surrenderee; (6) the surrender must not be of part of an estate; so if a person has a lease for ten years he cannot surrender the last seven years and keep to himself the first three years: Shep. Touch. 303; J. W. Smith, *Real and Personal Property*, 5th ed., pp. 759-760; Walk. Conv., 3rd ed., by Preston.

In *Cronkhite v. Imperial Bank* (1907) 14 O. L. R. 270 [Div. Ct.], in the circumstances noted at p. 1113, *post*, it was held there had been no surrender.

It is not necessary that the surrenderor of a lease, to begin at a future day, should be in possession in order to make a surrender before the period of commencement: thus, if a lease be to commence at Michaelmas next, and the lessee take a new lease under seal before Michaelmas, it is a surrender in law of the first lease: Shep. Touch. 302. As to surrender of leases *in futuro* or future interests, there is this distinction to be observed, that a lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender

before the day of the term begin, but he may by a surrender in law: *Id.* 304.

### *Implied Surrender.*

Such a surrender arises by operation of law as distinct from the act of the parties and will take place independently of the intention of the parties. The chief circumstances under which a surrender will be implied are [1] where the lessee accepts from his landlord a new estate or interest incompatible with his existing prior estate in the premises, or [2] where the lessee yields up possession with the consent of his landlord.

#### *I. The Acceptance of a New Estate.*

In discussing the meaning of "surrender by operation of law," Baron Parke said—*Lyon v. Reed* (1844) 13 M. & W. 285, at p. 306, 13 L. J. (Ex.) 377: "This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former."

The language of Tindal, C.J., in *Dodd v. Acklom* (1843) 6 Man. & G. 672, at p. 679, 13 L. J. (C.P.) 11, is to the same effect, and in *Nickells v. Atherstone* (1847) 10 Q. B. 944, at p. 948, 16 L. J. (Q.B.) 371, Lord Denman applies the words of Baron Parke quoted above.

#### *The New Estate must be Validly Created.*

Where the acceptance of a new lease is relied upon as working a surrender, the new lease must be a valid

lease—for no implied surrender by the grant of a new lease will take place if the latter be absolutely void: *Wilson v. Sewell* (1766), 4 Burr. 1975, 1 W. Blac. 617; *Doe d. Earl of Egremont v. Courtenay* (1848), 11 Q. B. 702.

So if the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease: Com. Dig. tit. Estates (G. 13).

The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term contracted for, is not a surrender of a valid former lease inconsistent therewith: *Doe v. Poole* (1848) 11 Q. B. 713.

A mere agreement for a future lease not amounting to an actual demise will not cause a surrender by operation of law: *John v. Jenkins* (1832) 1 Cr. & M. 227; *Foquet v. Moor* (1852) 7 Exch. 870; *Cannan v. Hartley* (1850) 19 C. B. 634, 648; *Badeley v. Vigurs* (1854) 4 E. & B. 71; and it seems that the second lease must be concurrent with the first, at least for some part of the term. A second lease executed to commence at the expiration of the first will not cause a merger: [See p. 698, *post*].

But the acceptance of a second lease for a shorter term than the first will be a surrender if concurrent: *Doe d. Wimburn v. Kent* (1837) 5 U. C. Q.B. (O.S.) 437.

Where the tenant, with the knowledge and consent of his landlord, takes a lease from another person to whom the landlord has transferred the reversion, this amounts to a surrender in law of the lease, the relation of landlord and tenant no longer exists and consequently the right to distrain is gone: *Lewis v. Brooks* (1850) 8 U. C. R. 576.

### *The Creation of a New Tenancy.*

The principle laid down in *Lyon v. Reed* (*ante*, p. 665), namely, that the creation of a new tenancy of the same premises will be a surrender of the old term has been frequently applied.

The tenant of a farm having absconded, his wife disposed of some of the cattle to one D. and then surrendered the lease to the lessor for \$120, and accepted a lease from the latter of the dwelling house on the premises at a rental of 50 cents a month. The tenant subsequently returned and resided with his wife in the dwelling house, and some three months afterwards notified the lessor that he refused to recognize the surrender, tendering back the money paid therefor. He still continued to reside in the dwelling house, and three months' rent therefor was paid under a threat of distress, and six months' rent afterwards; it was held that even assuming the wife to have no authority to make the surrender, the acceptance of the new tenancy of part of the originally demised premises and payment of the rent thereon was tantamount to a surrender of the term: *Ramsay v. Stafford* (1878) 28 U. C. C. P. 229.

There was an agreement to let to G. B. as yearly tenant a farm, including certain hill pastures and a flock of 700 sheep, and afterwards the lessor gave G. B. a notice to quit which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the lessor that G. B. should surrender a field, that G. B.'s rent should be reduced £10, and the notice to quit should be considered as withdrawn. G. B. then continued tenant of the farm less the field at the reduced rent, and it was held that neither the giving of the notice to quit and its withdrawal nor the surrender of the field and reduction of rent created a new tenancy: *Holme v. Brunskill* (1877), 3 Q. B. D. 495; 47 L. J. (Q.B.) 610 [C.A.].

Where a mortgagor who had attorned tenant to the mortgagee subsequently was given a lease of the mortgaged premises for one year, it was held that the term created by the attornment clause [if any, as to which see p. 247, *ante*] has been surrendered: *First National Bank v. Cudmore* [1917] 2 W. W. R. 479, 34 D. L. R. 201 [Sask.—Ct. en B.], following *Lyon v. Reed and Dodd v. Acklom*, *ante*, p. 665.

But in *Cronkhite v. Imperial Bank of Canada* (1907) 14 O. L. R. 270 [Div. Ct.], noted at length at p. 1113 (*post*), it was held there had been no surrender.

Where a firm composed of two persons are lessees, and on dissolution a new partner takes the place of a retiring one, a lease to the new firm will operate as a surrender of the old lease: *Adamson v. Boyd* (1868) 4 P. R. 204.

*New Tenancy for Part only of the Lands Demised.*

If a lessee for years accept a new lease by indenture of part of the lands, it is a surrender for that part only and not for the whole: *Carnarvon v. Villebois* (1844) 13 M. & W. 313, 342; *Morrison v. Chadwick* (1849) 7 C. B. 266; 18 L. J. (C.P.) 189.

A lessee of certain premises, which included those in dispute, under a lease for five years entered into a verbal agreement with his landlord to give up four or five acres of the land leased and take other land in lieu thereof. The latter was pointed out to the lessee and he took possession. The landlord sold to the defendant a part of the premises the lessee had agreed to give up, and defendant entered into possession thereof and erected buildings thereon, and the lessee at the request of the defendant ploughed this land, and by other acts evinced his consent to and connivance in the sale to the defendant and the possession taken by him, and it was held that there was a surrender by the lessee of this part by operation of law: *Horton v. Macconnichy* (1859) 9 U. C. C. P. 186.

A lease dated 1st April, 1885, for ten years, at an annual rent of \$120 payable quarterly each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before the 1st of January in any year. The lessee for his own business only occupied part of the premises and sublet the remainder. In November, 1891, the part subleased being unoccupied, the lessee verbally notified the lessor that unless the premises were repaired he would have to surrender. The lessor treated this as a valid notice



under the lease, and the lessee gave up possession of part of the premises, which the lessor then leased to other tenants, and the lessee became a tenant of the remaining part under an agreement inconsistent with his former holding and paid the rent under such last tenancy for a year. He also agreed that the lease should be cancelled in the event of the lessor selling the property, and this was held to amount to a surrender in law of the whole premises, and not merely of the part not occupied by the lessee, and that no actual intention to surrender was necessary: *Seldon v. Buchannan* (1893) 24 O. R. 349.

The lessee of five rooms for a term entered into negotiations with his lessors by which he was to hold three only of the rooms at a diminished rent, and on the next quarter day paid and took a receipt for rent at the lesser rate. No new contract of tenancy was ever signed, but the lessee gave up possession of the two rooms, and it was held that there was a new tenancy and a surrender of the former lease by operation of law: *Jones v. Bridgman*, (1878) 39 L. T. 500.

Reference should also be made to *Holme v. Brunskill*, discussed at p. 667, *ante*.

## II. Where the Lessee Yields up Possession.

Anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to remain in possession, will, if acted upon by change of possession, amount to a surrender by operation of law: *Phené v. Popplewell* (1862) 12 C. B. N. S. 334; *Oastler v. Henderson* (1877) 2 Q. B. D. 575.

Where the acts relied upon as acceptance by the landlord of a surrender are inconsistent with the continuance of the lease and amount to a virtual taking of possession by the landlord, the landlord is estopped from denying that there was a surrender in law of the tenancy: *Ontario Loan and Investment Co. v. O'Dea* (1895) 22 A. R. 349; 15 Occ. N. 233 [Ont.—C.A.].

The acts *in pais* which bind parties by way of estoppel are acts of notoriety not less formal and solemn than

the execution of a deed, as for instance, livery, entry, acceptance of an estate and the like: *Nickells v. Atherstone* (1847) 10 Q. B. 944; 16 L. J. (Q.B.) 371; *Cannan v. Hartley* (1850) 9 C. B. 634 (note); *Wallis v. Hands* [1893] 2 Ch. 75.

The surrender is presumed to have preceded the act to which the tenant is a party: *Cannan v. Hartley* (*supra*).

It is the act of law and takes place independently of and even in spite of the intention of the parties: *Lyon v. Reed* (*ante* p. 665), and when relied upon must be pleaded as such: *McNeil v. Train* (1848) 5 U. C. R. 91.

The most frequently cited English cases on this branch of the subject are: *Nickells v. Atherstone* (*supra*) and *Oastler v. Henderson* (1877) 2 Q. B. 575 [C.A.].

A tenant quitted possession of premises, and, on being applied to for rent, stated in a letter to his landlord, that he hoped his landlord would be able to let them to some other person on better terms; this the landlord did a few days later, and the new tenant entered and paid rent; it was held that these facts amounted to a surrender, but the Court declined to consider the effect of the letter as evidence of a surrender by a note in writing within the Statute of Frauds: *Nickells v. Atherstone* (*supra*).

Where a lease is perfected by the entry of the lessee, who afterwards leaves the country and sends the keys to the landlord, the fact that the latter, after receiving the keys, endeavors to rent the house, will not cause a surrender in law of the term. There must be an actual reletting or taking possession, and the fact that the lessor's workmen occupy some rooms in the house for a short time will not make any difference—the lessee still remains liable for the rent: *Oastler v. Henderson* (*supra*).

An order was made by the London county council for the making of repairs to a wall on the demised premises which bulged and was dangerous, and in consequence of the lessor entering to do these repairs the lessee gave

up possession and returned the key, and intimated that the tenancy was at an end. The lessor made no reply, but kept his men in possession doing repairs for some months, and thereby rendered the house uninhabitable, and it was held an eviction (that a surrender in law was to be assumed), and that the lessee was not liable for the rent: *Smith v. Roberts* (1892) 9 T. L. R. 77; 8 T. L. R. 506 [C.A.].

Where two persons demised a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife; it was held, that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor, who accepted the key, as agent of the other: *Dodd v. Acklom* (1843) 6 M. & G. 672.

The tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term, before the expiration of it, assigned all the premises, the house and cottages being in the possession of under-tenants; the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter; the assignee took possession of the stable and yard only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term the landlord re-let them; the tenant paid no rent after the assignment, but the landlord received rent from the undertenants, and before the expiration of the term he advertised the whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises: *Reeve v. Bird* (1834) 1 C. M. & R. 31; 4 Tyr. 612.

But where a tenant from year to year by a Lady-day holding orally agreed with his landlord's agent to quit at the ensuing Lady-day, which was within half a year; and the premises were re-let by auction, at which the tenant attended and bid, but the new tenant was not let into possession; it was held, that the tenancy was not determined, there not having been a surrender by operation of

law: *Doe v. Johnston* (1825) 1 McClel. & Y. 141; *Johnstone v. Huddleston* (1825) 4 B. & C. 922; 7 D. & R. 411; *Doe d. Murrell v. Milward* (1838) 3 M. & W. 328.

An oral agreement between a landlord and tenant from year to year that another tenant shall be substituted in his place, who is accordingly substituted and thereupon takes possession, is a sufficient surrender to determine the former tenancy: *Stone v. Whiting* (1817) 2 Stark. 235.

But the grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, does not operate as a surrender in law of the prior lease, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents: *Wallis v. Hands* [1893] 2 Ch. 75; 62 L. J. [Ch.] 586; following *Davison v. Gent*, (1857) 1 H. & N. 744; *Thomas v. Cook* (1818) 2 B. & Ald. 119, and *Lyon v. Reed* (1844) 13 M. & W. 285, reconciled on this point. The change of possession is necessary to take the case out of the operation of the Statute of Frauds and the 8 & 9 Vic. c. 106, s. 2, considered at p. 694 (*post*).

A parol agreement was made between a landlord and his tenant in December, being after the time when a valid notice terminating in March could be given, that the landlord would take a six months' notice expiring in June of the following year. Channell, J., held that what took place in December was a surrender "then and there" of the existing tenancy from year to year upon the acceptance by the tenant of a new tenancy for six months only, but in other respects upon the terms of the former tenancy. Bucknill, J., concluded that it was agreed there should be a new tenancy, *i.e.* a six-months' tenancy terminating in June: *Fenner v. Blake* [1900] 1 Q. B. 426; 82 T. L. R. 149; 69 L. J. (Q.B.) 257, and see *Stait v. Fenner* [1912] 2 Ch. 504.

If a landlord in the middle of a quarter accept from the tenant the key of the house demised, under a parol agreement that upon her then giving up the possession the rent shall cease, and she never afterwards occupy

the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key: *Whitehead v. Clifford* (1814) 5 Taunt. 518; *Furnivall v. Grove* (1860) 8 C. B. N. S. 496; 30 L. J. (C.P.) 3.

But where A. was tenant to B. of rooms for a term of years, and upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told it was the key of the rooms which A. had occupied; and A. immediately quitted possession, but no further communication took place, it was held not to amount to a surrender by act and operation of law: *Cannan v. Hartley* (1850) 9 C. B. 634; 19 L. J. C. P. 323.

### *The Canadian Cases.*

The principles laid down in these English cases have been the subject of much consideration in the Canadian Courts.

The mere consent of the lessee to a conveyance by the owner of the land of his interest in the reversion will not constitute a surrender of the lease by operation of law where the lessee still remains in possession. He must be a party to some act done, the validity of which he is estopped from disputing, and which would not be valid if the lease continued to exist. The defendant demised land to M. for a term of years by lease under seal, and afterwards, with the consent of M., conveyed the same land, with an adjoining piece, to the plaintiff in fee, and covenanted that it was free from incumbrances. M. remained in possession, but paid no rent, and it was held that this did not amount to a surrender of the lease by operation of law, and therefore there was a breach of the covenant in the deed of conveyance for a good title free of incumbrances: *Babbit v. Cowperthwaite* (1855) 8 N. B. R. 254.

A lease in writing for three years is not surrendered by operation of law by the landlord agreeing in writing to sell the premises to the tenant upon certain terms and

conditions to be afterwards completed, where everything in regard to the purchase is *in fieri*, and the tenant fails in doing anything to clothe himself with the character of purchaser: *Grant v. Lynch* (1856) 6 U. C. C. P. 178.

D. leased certain premises to one F., from whom he took a note in payment of arrears of rent. F. let M. into possession of the premises, and the latter made certain payments on account of rent, for which D. gave receipts as for premises leased to F. The note not being paid, D. distrained for the amount thereof, and it was held to be no satisfaction of the rent, nor did the facts show a surrender by F. of his term, a formal surrender having been made after the distress: *McLeod v. Darch* (1857) 7 U. C. C. P. 35.

A lease for five years was made at \$150 per year, under which the lessee entered, and before the end of the second year and before any distress, the landlord offered the lessee \$50 to allow him to take possession, and went to live in the house. The latter afterwards told a witness that he had let the place again to the lessee on shares, he, the lessor, living on it as owner. The lessor afterwards got the lease from the same witness, with whom it had been deposited by both parties, saying it was of no use. The lessee also lived in the house, but the agreement was that the lessor should have the right of possession. These arrangements were verbal, but it was held that the facts clearly showed a surrender by operation of law: *Coffin v. Danard* (1865) 24 U. C. R. 267.

The lessee of certain premises for a term of years having got into difficulties said to the lessor: "I can do nothing here and I am going to give the place up as soon as I get rid of the few things I have. I am going to leave as soon as a relation of mine comes." He then asked: "To whom shall I give the key?" The lessor replied: "To Partons." The lessee assented, and both then proceeded to fasten the windows. The lessee left and did not afterwards return. The lessor placed P. in charge, but the lessee had previously given P. the key and had instructed him not to deliver it to the lessor

without an order from the lessee. The lessor, however, got the key, and placed a man in possession. It was held that there was neither a surrender in law nor an executed contract by which the relation of landlord and tenant was put an end to. Neither the giving up of the key, if that had taken place, nor the abandonment of possession, would amount to a surrender in law, but the taking possession by the lessor as his own absolute property would be such surrender, or evidence of it, just as would the sale of the premises or the grant of a lease thereof to a third party: *Carpenter v. Hall* (1866) 16 U. C. C. P. 90.

B. sued on a bond securing payment by L. of the rent of certain premises, and averring that rent was then in arrear. Defendant pleaded on equitable grounds that L. had died having by will appointed defendant and another his executors, who continued in possession of the premises as tenants to B., under the lease to L., until a certain day, when an agreement (not stated to have been in writing), was entered into between the widow of L., the defendant, and the other executor, as executors, and one S., with B.'s consent, that S. should purchase the lease of the premises for the amount of rent then agreed upon as in arrear, and that the widow and executors should surrender the lease and possession of the premises, and S. should become tenant to B., and should have additional yard room, etc., and should in consideration thereof give his note payable to B. for the said agreed sum, and defendant should, as surety for S., join him as maker of the note, then the tenancy and defendant's liability on the bond and in respect of the rent should cease, and B. should accept the note and surrender of the lease and possession in satisfaction and discharge of the rent then overdue, and of defendant's liability on the bond and lease. That an endorsement was made under the hands and seals of the executors and the widow upon the lease at B.'s request and accepted by him, surrendering the said lease and all the estate and interest of the testator at the time of his death in the premises, as also their own interest therein as his execu-

tors, and that the widow consented thereto, and also surrendered to B.; that the note for rent was made by S. and defendant payable to B., and delivered by S. to him, and the latter took possession of the premises and accepted the surrender thereof in full satisfaction and discharge. The plea was held good both in substance and in form as setting up an entirely new contract and part performance in substitution of the former one, and B. was sufficiently identified with the whole transaction to be bound by it, as he had taken the benefit of it. It was also held that the defendants were not estopped from setting up this defence by the fact that when sued on the note they had pleaded that the consideration had wholly failed, for it appeared upon the record that there was not a complete failure of consideration, and that the parties could not be replaced as to their rights as they stood before the giving of the note: *Bradfield v. Hopkins* (1866) 16 U. C. C. P. 298.

The plaintiff in ejectment relied on a lease from K., one of the defendants, made in 1873, for ten years. The plaintiff took possession and built a house which, in October, 1875, was destroyed by fire, and in February, 1876, he became insolvent. There was rent in arrear which he could not pay. K.'s attorney said he was willing to take the place off his hands, and either the plaintiff or his wife delivered to him a copy of the lease, which he supposed to be the original, saying the lease was given up. Plaintiff's wife afterwards told K. that the lease was given up, and K. promised to lease her a shop in a block she was then building. K. then leased this land to the other defendants, who at once proceeded to expend about \$3,000 in building upon it, to which the plaintiff living in the village, though aware of it, made no objection, but when the foundation was nearly completed he registered the lease. It was held that there had been a surrender of the lease by operation of law, and that in addition the plaintiff was precluded, by acquiescence, from disputing the defendants' title, notwithstanding the alleged notice to them by registration of the lease: *Acheson v. McMurray* (1880) 41 U. C. R. 484.



A custom to surrender in the event of fire does not prevail in Ontario. Thus where after a lessee had harvested the crops on the farm, they together with the barn and stable were destroyed by fire, and he was paid the insurance money, whereupon he left the farm, and the lessor entered, ploughed and put in a crop of fall wheat, the latter afterwards applied on several occasions for payment of the rent, when the lessee said he had no money. It was also shown that a proposition had been made to leave the matter to arbitration, and it was held that the acts of the lessor did not amount to an eviction and that there was no surrender in law; and he was therefore entitled to recover the rent on the covenants in the lease: *Nixon v. Maltby* (1882) 7 A. R. 371.

A lessor, by his agent, in June, 1881, verbally leased to S. & W. for three years certain premises in which the latter carried on business in partnership for about a year, when W. sold out his interest to one D., who, in partnership with S., carried on the same business for about ten months, when S. withdrew from the partnership and sold out his interest to D., who agreed with S. to pay all rent then due or to become due in respect of the premises, which he continued to occupy and pay rent for. The lessor, without authority, drew for a quarter's rent on S. & D., who refused to accept it, and a fire having occurred on the premises the lessor expended the insurance money on repairs with D.'s consent. Default having been made of six months' rent, due on 15th Dec., 1883, the lessor instituted proceedings against S. & W. for the recovery thereof. It was held that although the lessor was cognizant of the several changes in the partnership, and the occupation by D. of the premises, these acts were not evidence of a surrender in law, and that the lessor was not estopped from enforcing payment of the overdue rent against S. & W.: *Gault v. Shepard* (1888) 14 A. R. 203.

Tenants who desired to go out of possession were told by the landlord's agent that if they procured another tenant they might leave but that they would remain liable for the rent. They obtained a new tenant upon

whom they distrained. In an action by the landlord for rent they set up a surrender. It was held, following *Oastler v. Henderson* (*ante*), and distinguishing *Thomas v. Cooke* (1818), 2 B. & Ad. 119, that there was no surrender: *Lougheed v. Tarrant* (1893) 2 Terr L. R. 1; 13 Occ. N. 473 [N. W. T.—Rouleau, J.].

Where a tenant moved out and left the key at the landlord's office and the landlord used the key, made slight repairs requested by the tenant, put up a "to-let" sign and cleaned the premises, these acts were held too ambiguous for this purpose. *Oastler v. Henderson*, *Nixon v. Maltby* and *Gault v. Shepard* (*ante*) applied; *Smith v. Roberts* (*supra*) distinguished: *Ontario Loan and Investment v. O'Dea* (*supra*).

A tenant from year to year had a conversation with his landlord about surrendering the premises in March but no notice to quit was served. In March the landlord agreed to advertise the premises at the tenant's expense and did so but could not obtain a tenant. In May the tenant moved out, leaving the key with the landlord who refused to accept a surrender. In July the premises were used in connection with an opera house in the same building, but it did not appear who gave the authority to use them. It was held, citing *Phené v. Popplewell* and *Oastler v. Henderson*, that there had been no possession of the premises by the landlord so inconsistent with the tenant's term as to amount to a surrender by operation of law. *Dockrill v. Russell* (1896) 17 Occ. N. 17 [N.B.—McLeod, J.].

In *Trim v. Baines* (1900) 20 Occ. N. 145 [B.C.—Bole, Co.J.], it was held that there was no surrender by operation of law, and that a verbal agreement to cancel a lease—even if made—could not work an estoppel in the absence of some act which is inconsistent with the continuance of the lease: *Nickells v. Atherstone*, *Oastler v. Henderson*, *Nixon v. Maltby* and *Gault v. Sheppard* referred to.

H. & Co., tenants of a store, assigned to R. for the benefit of creditors. R. did not take possession of the premises. The landlord on the third day after the assignment

requested and obtained from H. & Co. the keys of the premises, which she proceeded to clean up and repair, and took down a sign-board having on it the firm name of H. & Co., and painted the name out. It was held there was a surrender by act and operation of law: *Phené v. Popplewell* [p. 669, *ante*] applied: *Gold v. Ross* (1903) 23 Occ. N. 253; 10 B. C. R. 80 [Full Court].

In *Delamatter v. Brown Bros.* (1905) 9 O. L. R. 351; 5 O. W. R. 423 [Div. Ct.]. Meredith, C.J.C.P., said, at p. 354: "In order that the acts of the parties may amount to a surrender by operation of law, it is necessary that there be an agreement by the landlord and the tenant that the term be put an end to, acted on by the tenant's quitting the premises and the landlord by some unequivocal act taking possession."

Negotiations took place, looking to a surrender of a lease, but no final arrangement was ever arrived at, and the landlord told the tenant he would cancel his lease for non-fulfilment of some of the covenants. The tenant said he wanted that in writing and remained in possession until next day when he was served with notice to quit, and that the landlord had cancelled the lease for non-fulfilment of the covenants, when he vacated the premises after selling the landlord some oats and barley he had there. The landlord then resumed possession. A few days later the tenant came back and sold his poultry to the landlord and then left the farm altogether. Held there was no surrender of the lease and the landlord was liable in damages as for an eviction of the tenant: *Watson v. Moggey* (1905) 15 M. R. 241; 1 W. L. R. 438; 25 C. L. T. 468 [Ct. en B.].

*Harrod v. Watt* (1905) 1 W. L. R. 216 [N. W. T.—Newlands, J.], it was held there was no eviction when the landlord entered to protect premises abandoned by the tenant. The landlord cleaned and locked up the premises which had been left open to the public. He later unlocked them to allow the tenant to put in a sub-tenant and when the tenant left relocked them but kept the key to hand to the tenant.

*Yukon Trust Co. v. Murphy* (1905) 2 W. L. R. 298 [Y.T.—Craig, J.], a tenant properly exercised his right

of renewing his lease for a year by writing a letter to the landlord. Before the renewal term began he wrote another letter attempting to cancel his renewal, but the landlord refused to assent to such cancellation. A sublessee of the tenant paid rent direct to the ground landlord during the original term: after the date of commencement of the renewal term he made payments to the ground landlord who gave receipts on account of the rent due from its tenant and never treated him as tenant. It was held that the tenant could not revoke his exercise of the option and there had been no surrender by operation of law.

*Yukon Trust Co. v. Popich* (1908) 8 W. L. R. 852 [Y.T.—Craig, J.], reviewed the cases and held that there was no surrender in the following case. The landlord and tenant settled an action for breach of the covenant for quiet enjoyment by the landlord rebating certain rent. A short time later the tenant handed the key to the landlord's agent saying he was going out and could not afford to continue. Nothing was said about surrender and no release was given. A week later the key was given to a prospective tenant who subsequently let the premises.

In *Ellis v. Fox* (1909) 11 W. L. R. 98 [Sask.—Johnstone, J.], it was held there had been no surrender where a notice of cancellation of a lease was properly given to a tenant in pursuance of a power to cancel, and the tenant did not go out of possession until some months later.

*Boyd v. Naismith* (1909) 12 W. L. R. 233 [Sask.—Full Ct.]. A tenant went into possession under a written agreement, not under seal, for a lease for a term of ten years. Fifteen months later he and his landlord executed a lease under seal for one year. It was held that the lease being valid [as to which see p. 123, *ante*] the acceptance of the new lease implied the surrender of the existing lease, considering *Lyon v. Reed*, *Caverhill v. Orvis* and *Fenner v. Blake*.

*Rumball v. Hoskins* (1909) 11 W. L. R. 250 [B.C.—Lampman, Co.C.J.]. A monthly tenant told his land-

lord he had found a cheaper house more suited to his limited means and would move out two days later. The landlord said he was glad he was getting a cheaper house—next day put a “to-let” sign in the window and the tenant moved out the following day: Held a surrender by operation of law.

The plaintiffs, who were tenants of the defendants under a lease for five years, sublet to a tenant who vacated at the end of a year. They then requested the defendants to find them another sub-tenant. The defendants controlled the adjoining premises which they wished to repair, and arranged with R., the tenant of those premises, to move into a part of the plaintiff’s premises while the repairs were being made. R. agreed to pay a small rent, to allow a “to-let” sign to be displayed and to show the premises to prospective sub-tenants. Teetzel, J., held that although this was done without the plaintiff’s knowledge there was no eviction, as it was plain that the defendant did not intend to terminate the lease, and only permitted R. a temporary occupation in the interest of the plaintiff: *Mickelborough v. Strathy* (1910) 21 O. L. R. 259; 16 O. W. R. 265; 1 O. W. N. 846.

This decision was affirmed in (1911) 23 O. L. R. 33; 18 O. W. R. 206; 2 O. W. N. 537 [Div. Ct.], where it was argued that the plaintiff’s case did not rest on eviction but on an estoppel *in pais*, as in *Lyon v. Reed* (1844) 13 M. & W. 285, that there was a surrender by act and operation of law and that intention had nothing to do with the matter. This raised for consideration the question of a lease by the landlord to a third party [the question of a tenant taking a new lease has been discussed at p. 665, *ante*]. Riddell, J., in discussing this, said, at p. 38, “most of the cases will be found discussed in Sm. L. C., 11th ed., vol. 2, pp. 837, under the caption of ‘estoppel *in pais*.’ The use of the expression ‘estoppel’ in such cases has become fixed, although there may be some doubt as to its propriety. See *per* Lord Denman, C.J., in *Nickells v. Atherstone* (1847) 10 Q. B. 944, at p. 949.”

*Arden Hotel Co. v. Mills* (1910) 20 M. R. 14; 14 W. L. R. 410 [Man.—C.A.]. Between the time of the execution

of a lease to commence *in futuro* and the commencement of the term, the lessee notified the lessor that he would not occupy the premises. The lessor declined to release him and continued to run the business carried on there and finally leased the premises to D. The Court of Appeal assumed that the trial judge [Ryan, Co.J.,] found that a notice was given that the premises were being let in the tenant's interest and held there was no surrender by operation of law. This case is also discussed at p. 178, *ante*, and see *Fitzgerald v. Mandas*, noted at p. 178.

In *Greenwood v. Bancroft* (1912) 17 B. C. R. 151, 20 W. L. R. 816; 2 D. L. R. 417; 2 W. W. R. 162 [C.A.], the tenant entered under a lease for five years renewable for five years on giving six months' notice in writing. The original term expired 23rd December, 1907. An insufficient notice of renewal was given March 6th, 1907. The tenant remained on after December 23rd, the landlord claiming his notice ineffectual. On February 8th, 1908, the tenant wrote a letter agreeing to "take off from" his lease two years. In an action for possession it was held there was a surrender by operation of law and that the letter created an estoppel which prevented the tenant from saying that his tenancy was to last longer than three years. *Fenner v. Blake* [1900] 1 Q. B. 426, cited. It was also held that in view of s. 3, stats. 1903-4, c. 20, it was not necessary that the surrender of the portion of a term granted by instrument under seal should also be under seal.

While litigation was pending between landlord and tenant a settlement was arrived at by which the landlord was to give a lease to G., a sub-tenant of the tenant. The landlord executed the lease but G. did not, although he paid rent to the landlord and commenced to fix up the premises. Curran, J., held on the facts that there had been a surrender by act and operation of law: *McKeown v. Lechtzier* (1913) 26 W. L. R. 264; (1914) 24 M. R. 295. His judgment was affirmed (1914) 28 W. L. R. 558; 20 D. L. R. 986; 24 M. R. 295 [C.A.], and by the Supreme Court of Canada (1914) 7 W. W. R. 1394.

*Re Clancey & Schermehorn* (1914) 31 O. L. R. 435; 6 O. W. N. 478 [App. Div.] A tenant—whose lease under seal expired the last day of April, 1915—in January, 1914, told his landlord he intended to leave the premises. On the 30th January, 1914, his solicitor sent a letter enclosing a statement of accounts and a cheque and requesting to be notified that the tenant could give up possession. The landlord's solicitor by subsequent letters expressed the landlord's willingness that the tenant should go out of possession, and the balance of rent was subsequently adjusted and paid. It was held that what was done did not work a surrender by operation of law: distinguishing *Fenner v. Blake* [p. 672, *ante*] and *Stait v. Fenner* [p. 672, *ante*], and an order of a county judge for possession, made on the landlord's application, was set aside. It was held also that having regard to the provisions of R. S. O. 1914, c. 102, s. 3, the authority of the tenant's solicitor to surrender the lease on his behalf, by a letter, was not established.

In *Crozier v. Trevarton* (1914) 32 O. L. R. 79; 7 O. W. N. 111; 22 D. L. R. 199; [Boyd, C.]; already discussed at p. 327 as to eviction, and p. 328 as to apportionment; it was held that where a tenant abandoned a farm notifying his landlord, who relet without notifying the tenant that the reletting was on his account, the surrender was accepted and the tenant evicted. The landlord might have preserved his claim under the tenant's lease by proper warning, such as that he was reletting on such tenant's account, given to the tenant.

Where a tenant gave a defective notice to quit, the landlord received the key, wrote that he had given instructions to rent the premises and a to-let placard was put up, to all of which the tenant made no objection. Held, following *Mickleborough v. Strathy* (*ante*), that such acts were not necessarily an acceptance of the premises by way of surrender—that it depended upon intention, and there was no such intention in this case. *McBride v. Ireson* (1915) 35 O. L. R. 173; 9 O. W. N. 299 [App. Div.].

*Purvis v. Shephard* (1915) 8 O. W. N. 578 [Sutherland, J.]. A tenant claimed his landlord had taken down a barrier which he had put up to keep tenants under the same landlord of adjoining premises from passing through his premises in assertion of a right of way. Held that there had been no eviction, and only temporary trespass by the other tenants.

In *North-West Theatre Co. v. MacKinnon* (1916), 52 S. C. R. 588; 9 W. W. R. 1255 [S.Ct.—Alta.], and see p. 407 *ante*, it was attempted to be set up on behalf of an assignee for the benefit of creditors that the landlords took him as tenant under a new lease for such period as he should require to occupy the premises in order to dispose of the assets of the assignor, and that they thereby accepted a surrender of the tenant's lease, but upon the evidence adduced—see per Anglin, J., at pp. 601 and 602—it was held that no such arrangement was entered into.

In *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466; 42 D. L. R. 596; 14 O. W. N. 54 [App. Div.], a tenant in possession under a lease under seal verbally agreed to give up possession before the expiration of the term, but did not do so. It was held, following *Coupland v. Maynard* (1810) 12 East 134, and *Re Clancey and Schermehorn* (*supra*), that there was no surrender of the lease by operation of law.

*Wintemute v. Taylor* [1919] 2 W. W. R. 882 [B.C.—Clement, J.] was a case of surrender by operation of law when assignments of a lease were made to successive assignee companies formed on various re-organizations of a business.

*Calgary Brewing and Malting Co. Ltd. v. Williams*, further considered at p. 691, *post*, was a case of surrender: the tenant abandoned the premises and the landlord re-entered and made changes in the buildings a few days later.

*Hart v. Jost* (1894) 27 N. S. R. 243. The burden of proving a surrender is upon the person asserting it, and where at the time of the alleged surrender the landlord gave a receipt upon account that was held to be incon-



sistent with a mutual agreement to terminate the tenancy. The surrender was alleged to have taken place in October. The landlord let the premises for a term to begin in May following.

The question of surrender is also touched upon in *Gordon v. Sime* (1917) 44 N. B. R. 535; 37 D. L. R. 386; *Fitzgerald v. Mandas* (1910) 21 O. L. R. 312; 16 O. W. R. 425; 1 O. W. N. 878 [App. Div.] (noted at p. 178); *Corse v. Moon* (1889) 22 N. S. R. 191; *Beckford v. Brandle* (1920) 50 D. L. R. 450 [Alta.—Scott, J.] *Anglischick v. Rom* (1914) 26 O. W. R. 797; 7 O. W. N. 42 [Britton, J.]; *Mah Po v. McCarthy* (1909) 10 W. L. R. 670; 2 Sask. L. R. 119 [Newlands, J.—Ct. en B.].

A tenant of certain premises, whose lease had nearly a year to run, was on the 13th January applied to by the landlord to surrender the remainder of the term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st February, otherwise to be treated as an overholding tenant without colour of right. In consequence of negotiations between the parties the tenant did not actually give up possession until the end of February, but he was not asked for possession, and never refused to give it. Possession was then accepted by the landlord's agent, the tenant agreeing to deduct a month's rent from the \$250; but the landlord refused to pay the balance on the ground of non-delivery of possession on the day named, and it was held that as time was not made the essence of the contract the delay formed no defence to an action to recover the consideration for the surrender: *Dainty v. Vidal* (1888) 13 A. R. 47.

#### OPERATION OF SURRENDER.

##### *Rights of Third Persons.*

“Having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they receive prejudice touching any right or interest they may have had before the surrender, the estate surrendered hath in consideration of law a continuance” Co. Litt. 338*b*; Shep. Touch. 300. “A lessee can only give title to his lessor by a surrender to the same extent that he could

give it to another person by his assignment . . . he cannot convey to his landlord, any more than to anyone else, anything that he has not got himself." per Chancellor, J., in *Walter v. Yalden* [1902] 2 K. B. 304 at 310.

The surrender by the lessee will not destroy any interest which a stranger claiming under him, such as an under-lessee, has previously acquired in the term, unless such under-lessee expressly assents to the surrender and in effect attorns to the surrenderee: *Lambert v. McDonnell* (1864) 15 Ir. C. L. R. 136. "Though the estate may be effectually destroyed by the surrender, as between the surrenderor and surrenderee, yet it continues as to strangers who in the intermediate time have acquired an interest in it": per Bagley, J., in *Pleasant v. Benson* (1811) 14 East, 234, at 238; *Doe d. Beldon v. Pyke* (1816) 5 M. & S. 146. This principle will apply also where a right of forfeiture has accrued but the landlord has waived such right by accepting a surrender: *Great Western R. C. v. Smith* (1876) L. R. 2 C. D. 235; (1877) 3 A. C. 165; even if such surrender be without knowledge of the act causing forfeiture: *Parker v. Jones* [1910] 2 K. B. 32.

If a lessee mortgages tenants' fixtures and afterwards surrenders his lease, the mortgagee has a right to enter and sever them: *London and Westminster Loan and Discount Co., Ltd. v. Drake* (1859) 6 C. B. N. S. 796, provided he do so within a reasonable time after notice of the surrender: *Moss v. James* (1878) 38 L. T. 595; and a purchaser of trade fixtures from the tenant's trustee in bankruptcy is in the same position: *Saint v. Pilley* (1875) L. R. 10 Exch. 137.

A tenant of a farm mortgaged his growing and future crops, and afterwards the landlord distrained for rent, whereupon an agreement was entered into, whereby the distress was withdrawn and the tenant agreed to surrender up the farm and crops, which he subsequently did and the landlord entered into possession. In an action by the mortgagee against the landlord for trover in removing and selling the crop, it was held that the mortgagee was entitled to the value of the crop subject

to the rent due and also to the expenses of harvesting and making the crop fit for market: *Clements v. Matthews* (1883) 11 Q. B. D. 808; 52 L. J. (Q.B.) 772 [C.A.].

Though the taking of a second lease works a surrender as between the parties, it has not always that effect as against third persons. Thus where prior to mortgaging the property the mortgagor had made a lease not under seal for five years, and after the mortgage he made a second lease by indenture under seal, it was held that as against the mortgagee, who sought to eject the lessee without notice, there was a yearly tenancy still subsisting under the first void lease and that a notice to quit or demand of possession was necessary: *Caverhill v. Orvis* (1862) 12 U. C. C. P. 392.

When a person voluntarily surrenders his lease he cannot by so doing put an end to an under tenancy created by himself, nor dispense with the necessity of giving a notice to quit to his under-tenant: *Mellor v. Watkins* (1874) L. R. 9 Q. B. 400. "We consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third parties, who at the time of the surrender had rights which such extinguishment would destroy, and that, as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered still has, for the preservation of their right, continuance." Per Lord Ellenborough, C.J., in *Doe d. Beadon v. Pyke* (1816) 5 M. & S. 146 at 154. See Co. Litt. 338b. It follows that in the case of a surrender by the lessee the original lessor becomes the owner of the reversion on the sub-lease: *Smalley v. Hardinge* (1881) 7 Q. B. D. 524.

One, Stratton, took a building lease of two plots of land A and B, with a restrictive covenant in respect of plot B with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot A. Stratton granted an underlease of plot B. During the negotiations for the underlease he told the underlessee that he was prevented by the terms of his lease from building so as to interrupt the sea view. On

his assurance the underlease was taken and villas were built. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. But it was held that the obligation of the covenant still remained so long as the underlease lasted: *Piggott v. Stratton* (1859) 1 De G. F. & S. 33.

### *Sub-Leases.*

At common law the surrender of the old lease would have left the under-lessees without a reversion expectant on the termination of their under-leases, and the under-lessees would have enjoyed the property without payment of rent or performance of covenants until the end of their current term.

But now by R. S. O. 1914, c. 155, s. 18, "Where the reversion expectant on a lease of land . . . is surrendered, the estate which for the time being confers as against the tenant under the lease, the next vested right to the land shall to the extent of and for preserving such incidents to and obligations on the reversion as but for the surrender . . . thereof would have subsisted, be deemed the reversion expectant on the lease."

### *Similar Legislation.*

England: 8 & 9 Vic. c. 106, s. 9.

New Brunswick: C. S. N. B. 1904, c. 153, s. 2.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 8.

The object of this enactment was to do away with the rule that the covenants of and remedies against a lessee and the obligations on the lessor being incident to the immediate reversion, cease as regards the land on the merger of that reversion in another estate: *Webb v. Russell* (1789) 3 T. R. 393; *Stokes v. Russell* (1789) 3 T. R. 678; *Wootley v. Gregory* (1828) 2 Y. & J. 536; *Burton v. Barclay* (1831) 7 Bing. 745.

Where there is a lease and sub-lease, and the former is surrendered, the original lessor having the next vested right to the land becomes under the Act the holder of the reversion as against the sub-lessee, and may enforce

payment of rent by distress: *Laur v. White* (1868) 18 U. C. C. P. 99; and if merely cancelling the lease do not divest the estate the right to distrain would remain as before: *Id.*

A surrender in bankruptcy is within this statute, and where after making a sub-lease the lessee became bankrupt and the trustee disclaimed, this was held a surrender of the lease to the original lessor, who then became the holder of the reversion on the sub-lease, and could not bring an action to recover possession: *Smalley v. Hardinge* (1881) 7 Q. B. D. 524; 50 L. J. (Q.B.) 367; 44 L. T. 503; 29 W. R. 554 [C.A.], except of course in respect of a cause of forfeiture arising after surrender: see also *Ex parte Walton* (1881) 17 Ch. D. 746; 50 L. J. (Ch.) 657 [C.A.].

See also *Plummer and John v. David* [1920] 1 K. B. 326; 89 L. J. (K.B.) 1021.

### *Surrender for Purposes of Renewal.*

By [Imperial] Landlord and Tenant Act (1730); 4 Geo. II. c. 28, s. 6, after reciting "that whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees; for preventing such inconveniences, and for making the renewal of leases more easy for the future," *it is enacted*, "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered

at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, etc., for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease."

#### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 9.

Ontario: R. S. O. 1914, c. 155, s. 62 (1), (2).

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 50 (1), (2).

The statute makes the new lease the reversion immediately expectant on the termination of the sublease, and the lessee of the new lease has the same right to rent and performance of covenants as the former reversioner, and on the other hand the sub-lessees have corresponding rights against the new lessee: *Ecclesiastical Commissioners v. Treemer* [1893] 1 Ch. 166; 62 L. J. (Ch.) 119.

Under this Act the surrender leaves the sub-interests untouched, and the grantee of the renewed lease is in the same position as the assignee of the reversion would be if his assignor, being owner in fee, had made a lease and then assigned the reversion: *Cousins v. Phillips* (1865) 3 H. & C. 892; 35 L. J. (Ex.) 84. And see *Plummer and*

*John v. David* (1920) 89 L. J. (K.B.) 1021, and *Cole v. Kelly* [1920] 2 K. B. 106; 89 L. J. (K.B.) 819.

Where premises were demised and underlet, and the first tenant surrendered his lease, and took a new one with similar covenants, but the under-tenant continued in possession and never surrendered, it was doubted whether special covenants in the new lease, co-extensive with those in the old, could be enforced by the new landlord against the under-tenant as "duties reserved" by the second lease under the statute: *Doe d. Palk v. Marchetti* (1831) 1 B. & Ad. 715; *Wootley v. Gregory* (1828) 2 Y. & J. 536.

The following provisions were contained in the lease considered in *Calgary Brewing and Malting Co. Ltd. v. Williams* [1919] 2 W. W. R. 919; 48 D. L. R. 224; 12 Sask. L. R. 318.

(d) That the lessees shall build, but not later than Nov. 1st, 1912, subject to the approval of the lessor or his architect, a building, or buildings, located on the easterly forty-five (45) feet of said lot number forty-two (42), 25 feet by 45 feet and extending to the land in the rear of said Lot No. 42 according to the plan thereof. . . .

(o) That all the improvements which shall be put on the demised premises by the lessees shall become the absolute property of the lessor, subject to this lease, but at the expiration of the said term, the lessor agrees to purchase from the lessees the building erected on the said easterly 45 feet of said Lot 42 after an annual reduction of 5 per cent. on the cost value thereof, per year, is made for the depreciation in value of the said building erected on the easterly 45 feet of said Lot 42.

The lease was for the term of 10 years, from August 31, 1912. The lessees abandoned the premises in June and the lessor re-entered on July 12, 1915.

Newlands, J.A., said, p. 922:

"This abandonment and re-entry would be a surrender of the lease, and the question is, whether the surrender is such 'an expiration of the term' as would entitle the lessees to recover the value of the building erected by them under the above provisions of the lease.

“The word ‘term’ may apply to either the time for which an estate is run or to the estate itself. In this case I think it refers to the estate, because although the lease is for 10 years and the building in question is to be built before November 1, 1912, the price to be paid at the end of the term is to be the value of the building, less five per cent. for each year. A provision of this kind would only be necessary if the estate might terminate in an indefinite time. I therefore think the covenant on the part of the lessor is to pay for the building at the termination of the estate and not at the end of 10 years.

“That being the case, does the termination of the lease in this case by the abandonment of the tenant and the re-entry by the landlord, make the landlord liable under the above covenant? This part of the agreement was not to come into effect until the termination of the lease. I cannot see therefore how an abandonment and re-entry which terminates the tenancy has any effect upon the liability of the landlord to pay for a building when the tenancy is terminated.”

Haultain, C.J.S., said at p. 922: “The fact that the clause in question makes provision for an *annual* reduction of five per cent. for depreciation in the value of the building, suggests that an earlier determination of the tenancy was within the contemplation of the parties. If it had been intended to postpone payment for the building for 10 years without regard to the tenancy, it would have been simpler and more natural to have provided for a 50-per-cent. reduction. The reasoning of the Master of the Rolls in *Bevan v. Chambers* (1896) 12 T. L. R. 417, as to the proper course to follow in the case of two possible constructions, seems to me to apply with equal force to the facts of this case.”

The tenant was given judgment for the value of the building: the decision of Bigelow, J. [1919] 1 W. W. R. 653, was reversed.

The owner of land with a saw mill thereon made a lease of the mill with a right to cut timber during his lease. The lessee assigned the lease and the assignee afterwards surrendered it to the proprietor of the free-



hold, and it was held that the right of cutting timber was at an end except for the use of the mill: *Stegman v. Fraser* (1858) 6 Grant, 628.

*Surrender by Person Under Disability.*  
*Infants.*

By the Infants' Act, R. S. O. 1914 c. 153, s. 6:

"Where any person under the age of twenty-one years, is entitled to any lease made or granted for the life or lives of one or more persons, or for any term of years either absolute or determinable on the death of one or more persons, or otherwise, such person, or his guardian, or other person, on his behalf, may apply to the Supreme Court, and, by the order and direction of the Court, such infant, or his guardian, or any person appointed in the place of such infant by the Court, may be enabled from time to time, by deed to surrender such lease, and accept and take, in the place, and for the benefit, of such person under the age of twenty-one years, a new lease of the premises comprised in such surrendered lease, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was, or were, mentioned or contained, in the lease so surrendered at the making thereof, or otherwise as the Court shall direct."

Taken from [Imp.] 11 Geo. IV. and 1 Wm. IV. c. 65, s. 18.

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 107, ss. 56 *et seq.* s. 55.

Section 7 of the Ontario Act [11 Geo. IV. and 1 Wm. IV. c. 65, s. 14 [Imp.] governs charges attending the renewal and section 8 provides that the new leases are to be to the same uses. [11 Geo. IV. and 1 Wm. IV. c. 65, s. 15 (Imp.)].

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 107, ss. 47 and 48.

By s. 12 of the Ontario Act "Every surrender, and lease, made or accepted, by virtue of this Act, shall be deemed to be as valid, and effectual, as if the person by whom, or in whose place, the same was made or accepted, had been of full age, and had made or accepted the same."

Taken from 11 Geo. IV. and 1 Wm. IV. c. 65, s. 31.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911 c. 107, s. 55.

### WHEN SURRENDER TO BE IN WRITING.

ARTICLE 109.—A surrender by act of the parties must always be in writing signed by the party surrendering or his agent thereunto lawfully authorized in writing, and in some provinces must in certain cases be by deed.

[Authorities: Statute of Frauds, 29 Car. II. c. 3, s. 3.]

At common law anything that might be granted by mere words without writing might be surrendered in like manner by parol, even if in fact the estate or interest to be surrendered had been created by deed: Co. Litt. 338*a*; Shep. Touch. 307, and this was the case with all leases for years of corporeal hereditaments.

By the Statute of Frauds, 29 Car. 2, c. 3, s. 3, "no leases, estates or interests, either of freehold or of term of years, or any uncertain interest . . . of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be . . . surrendered, unless it be by deed or note in writing signed by the party so . . . surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 92, s. 3.

New Brunswick: C. S. N. B. 1903, c. 140, s. 8.

Nova Scotia: R. S. N. S. 1900, c. 141, s. 4.

Ontario: R. S. O. 1914, c. 102, s. 3.

A parol agreement to surrender is therefore inoperative: *Johnstone v. Hudlestone* (1825) 4 B. & C. 922; *Doe d. Murrell v. Milward* (1838) 3 M. & W. 327, followed in *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 466 [App. Div.].

*In Certain Cases by Deed.*

By the Imperial Real Property Act (1845) 8 & 9 Vic. c. 106, s. 3, "A surrender in writing of an interest in any Tenements or Hereditaments, . . . not being an interest which might by law have been created without writing . . . shall . . . be void at law unless made by deed."

*Similar Legislation.*

New Brunswick: C. S. N. B. 1903 c. 152, s. 12.

Ontario: R. S. O. 1914, c. 109, s. 9.

Terms of years which may be created without writing are specified under Article 9, p. 102, *ante*.

The effect of the above statutes is that, although a term of years may sometimes be created without writing, e.g., a term not exceeding three years from the making at a "two-thirds" rent [see Article 9] yet a surrender of *any* term must be either (1) by deed or note in writing, and in the cases above mentioned by deed under seal, or (2) by act and operation of law—8 & 9 Vic. c. 106, not having altered the law as to a surrender in law: *Lewis v. Brooks* (1850) 8 U. C. R. 576; *Thursby v. Plant* (1669) 1 Wms. Saunders, 291, edn. 1871; *Acheson v. McMurray* (1880) 41 U. C. R. 484; *Doe d. Burr v. Denison* (1850) 8 U. C. R. 185.

A lease for years cannot be surrendered by merely cancelling the indenture without writing: *Doe d. Burr v. Denison* (*supra*); *Wootley v. Gregory* (1828) 2 Y. & J. 536; *Ward v. Lumley* (1860) 5 H. & N. 87-656; 29 L. J. (Ex.) 322; *Ellis v. Fox* (1909) 11 W. L. R. 87 [Sask.—*Johnstone, J.*].

Where a lease appeared to have the names of the parties torn off, it was held that it was neither a sur-

render by operation of law nor *prima facie* evidence of a surrender by deed or note in writing: *Doe v. Thomas* (1829) 9 B. & C. 288.

A recital in a second lease that it was granted in consideration of the surrender of a prior lease of the same premises is not a surrender by deed or note in writing of the prior lease, it not purporting to be of itself a surrender or yielding up of the interest: *Roe d. Earl of Berkeley v. York (Archbishop of)* (1805), 6 East 86; *Doe d. Earl of Egremont v. Courtenay* (1848) 11 Q. B. 702.

An agreement for a reference in regard to the cancellation of a lease, followed by an award that the lessor "shall release and give up to the lessee the term of years as agreed to in the submission," will not work a surrender of the term, for the submission and award are not a deed as required by law: *O'Dougherty v. Fretwell* (1853) 11 U. C. R. 65.

But giving up and cancelling a lease by a tenant is a circumstance and a strong one to be considered in connection with what is done further, and the subsequent conduct of the tenant may on the principle of estoppel be considered an implied surrender of the term: *Doe d. Burr v. Denison (supra)*; as to estoppel in such a case see p. 665, *ante*.

A wife may act as agent for her husband in surrendering a lease, and a letter from her husband may constitute a sufficient authority: *Wheeldon v. Milligan* (1879) 44 U. C. R. 174; see also *Ramsay v. Stafford* (1878) 28 U. C. C. P. 229. So while her husband is in prison a wife may cause a surrender by operation of law, or at all events so act as to be estopped from disputing a lease granted to another person: *Crocker v. Sowden* (1873) 33 U. C. R. 397. As to the authority to a solicitor, see p. 683, *ante*.

A written request in this form, "We do hereby renounce and disclaim, and also surrender and yield up all right, etc.," a tenancy from year to year being in existence, has been held a surrender and not a disclaimer: *Doe v. Stagg* (1839) 5 Bing. N. C. 564.

A second lease under seal will extinguish the first if in writing only: *Caverhill v. Orvis* (1862) 12 U. C. C. P. 392; *R. v. Davenport* (1858) 16 U. C. R. 411.

In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than a mere agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amount overdue and accruing: there must be a consideration and an agreement to discharge: *Donaldson v. Wherry* (1898) 18 Occ. N. 306; 29 O. R. 552 [Div. Ct.].

### *Registration.*

The duties of registrars when leases have been surrendered otherwise than by the operation of law, are set out in the Alberta Land Titles Act (1906) 6 Edw. VII. c. 24, s. 59: and in the Saskatchewan Act (1917) 7 Geo. V. c. 18, s. 97.

## WHEN SURRENDER NEED NOT BE IN WRITING.

ARTICLE 110.—A surrender by operation of law is excepted from the Statute of Frauds and need not be in writing; much less need it be by deed.

[Authorities: *Infra Passim*.]

This rule applies to any term whether created by deed or by parol: *Davison v. Gent* (1857) 1 H & N. 744; *Wallis v. Hands* [1893] 2 Ch. 75; *Gault v. Shepard* (1888) 14 A. R. 206.

When there is a clause in a lease giving the lessee the right to determine a term in a certain event, but nothing is said as to the mode of doing so, it is not necessary to execute a formal instrument of surrender, but it may be done by an unequivocal act or declaration of the lessees communicated to the lessor, such as abandonment of the premises and notice to the latter of the fact: *Palmer v. Wallbridge* (1888) 14 A. R. 460; (1888) 15 S. C. R. 650.

## MERGER.

ARTICLE 111.—Whenever the particular estate and that immediately in reversion are both legal or both equitable, and by any act or event subsequent to the creation of the particular estate become vested in one person in the same right, a merger will take place.

[Authorities: Shep. Touch. 310 (o)].

Surrender and merger are often confounded. Every strict technical surrender is indeed attended with a merger of the estate surrendered; but merger may often take place where there is no surrender. Generally speaking wherever an inferior estate and the superior come together, merger takes place, although the superior may come to the inferior, and not, as in the case of surrender, the inferior to the superior: Shep. Touch. 310 note o.

Where there is a union of the term with the immediate reversion, both being vested at the same time in one person in the same right, the reversion merges or drowns the term, because they are inconsistent and incompatible: Bac. Arb. tit. Leases (R); *Salmon v. Swan* (1617) Cro. Jac. 619; *Burton v. Barclay* (1831) 1 Bing. 745. It follows that a particular estate will merge in a reversion of a shorter duration than itself: *Hughes v. Robotham* (1593) Cro. Eliz. 302; Poph. 30; as if one be lessee for one thousand years, and the reversion expectant thereon be granted to another for five hundred years who assigns it to the lessee, it will operate as a merger of the term of one thousand years in the term of five hundred years: *Stephens v. Bridges* (1821) 6 Madd. 66. "It is a clear principle that a term merges by union with the reversion, and that the right to the term and the right to the estate, subject to the term, cannot separately subsist in the same person. It is settled by authority that there is no difference in this respect, whether the party is entitled to the absolute interest of the reversion, or to an interest in the reversion for a limited time": per Leach, V.C., *Stephens v. Bridges*, *supra*, at 68.

To work a merger the interests must be concurrent, and not successive estates, so where a lessee took a second lease to commence at the expiration of the first, and the lessor having died, devised the premises to the lessee for his life, who thereupon conveyed his life estate to B., it was held that the lease to commence *in futuro* did not merge in the life estate: *Doe d. Rawlings v. Walker* (1826) 5 B. & C. 111.

Where a tenant for ninety-nine years purchased the reversion in fee and took a conveyance thereof to a trustee for himself expressly to prevent a merger, it was held that the term became one in gross and that there was no merger: *Belaney v. Belaney* (1867) L. R. 2 Ch. 138.

Where a lessee made an under-lease for all his term, except a few days, and then granted the under-lease and the rent thereby reserved to his lessor for the term mentioned in the under-lease (but not for the days so excepted), it was held that the chattel interest was not merged in the fee: *Burton v. Barclay*, *supra*.

If a lessor purchase the lessee's interest at a sheriff's sale, the term will merge in the fee, and the lessor will be entitled to the possession: *Stroud v. Kane* (1855) 13 U. C. R. 459. It is otherwise, however, where the term does not pass by the sale, as if sold under invalid process: *Duggan v. Kitson* (1861) 20 U. C. R. 316.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and voidable as to them, is nevertheless as between the parties a merger of the lease, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession when the transaction is adjudged fraudulent and the lessor's ownership appears: *McPherson v. Hunter* (1847) 4 U. C. R. 449.

D. and C. demised a strip of land for the purpose of a canal with a proviso that nothing should prevent D. and C., "their heirs or assigns," from using any of the land demised for certain purposes. By partition deed C. became the owner of a portion of the reversion, and D. of that on each side of C.'s portion. C. afterwards

conveyed the reversion in that portion of the canal to the lessees. D. still claimed the benefit of the proviso, and it was held that the proviso operated as a covenant with D. and C. as owners of the reversion, and not as owners of the adjoining lands, and that this covenant ran with the reversion, and when the reversion in that portion of the canal became vested in the lessees there was a merger, and the right of user was extinguished as to that portion of the canal: *Dynevor v. Tennant* (1888) 13 A. C. 279; 33 Ch. D. 420; 32 Ch. D. 375; 57 L. J. [Ch.] 1078; 59 L. T. 5.

The general rule is that a person cannot have a term for years in his own right and a freehold in *autre droit*, but that his own term shall drown in the freehold, but a man may have a term of years in *autre droit* and a freehold in his own right: *Webb v. Russell* (1789) 3 T. R. 393, 401.

In the absence of special circumstances, a term held by a person in his own right does not merge in the reversion held by the same person as administrator. An administrator granted an under-lease and the under-lessee afterwards assigned the residue of the term to the under-lessor, by name and not in his representative capacity, and it was held there was no merger: *Chambers v. Kingham* (1878) 10 Ch. D. 743; 48 L. J. [Ch.] 169; *Capital and Counties Bank Ltd. v. Rhodes* [1903] 1 Ch. 631.

And see *Greig and Thirlaway v. Franco-Canadian Mortgage Co., Ltd.* (1915) 9 W. W. R. 22 [Alta.—Hyndman, J.].

By R. S. O. 1914, c. 155, s. 18, where the reversion expectant on a lease of land merges . . . the estate which for the time being confers as against the tenant under the lease, the next vested right to the land shall to the extent of and for preserving such incidents to and obligations on the reversion as but for the . . . merger thereof would have subsisted, be deemed the reversion expectant on the lease.



*Similar Legislation.*

The statutes are set out at p. 688, *ante*.

The object of this enactment was to do away with the rule that the covenants of and remedies against a lessee and the obligations on the lessor being incident to the immediate reversion, cease as regards the land on the merger of that reversion in another estate: *Webb v. Russell* (1789) 3 T. R. 393; *Stokes v. Russell* (1789) 3 T. R. 678; *Wootley v. Gregory* (1828) 2 Y. & J. 536; *Burton v. Barclay*, (1831) 7 Bing. 745.

By the Law and Transfer of Property Act, R. S. O. 1914, c. 109, s. 36, there shall not be any merger by operation of law only of any estate the beneficial interest in which prior to the [Ontario Judicature Act, 1881] would not have been deemed merged or extinguished in equity.

This provision appeared in the Judicature Act until 1913.

*Similar Legislation.*

England: Judicature Act 1873, s. 25 (4).

Alberta: (1919) 9 Geo. V. c. 3, s. 37 (3).

British Columbia: R. S. B. C. 1911 c. 133, s. 2 (10).

Manitoba: R. S. M. 1913, c. 46, s. 26 (c).

New Brunswick: Stats. 1909, c. 5, s. 19 (4).

Nova Scotia: R. S. N. S. (1900) c. 155, s. 19 (3).

Saskatchewan: (1915) 5 Geo. V. c. 10, s. 25 (3).

In equity if the merger which would take place at law would occasion prejudice to a party having a previous equitable interest in the estate, such interest is not deemed to be merged: *Tyrwhitt v. Tyrwhitt* (1863) 32 Beav. 244-9; *Finlayson v. Mills* (1865) 11 Grant, 218. Where there would not be a merger both at law and in equity, then the merger shall not follow because it would operate at law, but where there would be a merger both at law and in equity, then the merger is to exist notwithstanding the provisions of the Act: *Snow v. Boycott* [1892] 3 Ch. 110, 116; 61 L. J. (Ch.) 591.

## FORFEITURE.

ARTICLE 112.—Forfeiture may arise by breach of covenant or by breach of condition — which depend upon the contract of the parties; or by act of law, by the tenant setting up a title hostile to that of his landlord or assisting another to do so.

*Breach of Covenant.*

This is dealt with in Article 114.

*Breach of Condition.*

This is dealt with in Article 113.

*Act of Law—Disclaimer.*

There is implied in every lease a condition that the lessee shall not do anything impugning the title of his lessor; and if there is a breach of this implied condition the lessor may re-enter if he so elects: 18 Hals. s. 1039.

If the lessee does anything to impugn his lessor's title he commits a disclaimer.

It is sometimes a nice question whether what has taken place does or does not amount to a disclaimer of the tenancy. The result of the cases seems to be, that if a tenant from year to year use any expressions which, being reasonably construed with reference to the circumstances under which they were uttered or written, amount to a denial of the existence of any tenancy as between him and the claimant, such expressions amount to a disclaimer. *Doe d. Calvert v. Frowd* (1828) 4 Bing. 560; 1 M. & P. 480; *Doe d. Grubb v. Grubb* (*infra*); *Doe v. Long* (*infra*); *Doe d. Whitehead v. Pittman* (*infra*); *Doe d. Davies v. Evans* (1841) 9 M. & W. 48; *Doe d. Phillips v. Rollings* (1847) 4 C. B. 188, 200; *Doe d. Landsell v. Gower* (1851) 17 Q. B. 589; 21 L. J. (Q. B.) 57.

On the other hand, if the expressions used cannot under the circumstances be reasonably construed to

amount to such a denial, they will not operate as a disclaimer, nor render a notice to quit unnecessary: *Doe d. Lewis v. Cawdor* (*infra*); *Jones v. Mills* (*infra*).

There must be a direct repudiation of the relation of landlord and tenant or a claim to hold the possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it: *Doe d. Gray v. Stanion* (1836) 1 M. & W. 695, 703; *Hunt v. Allgood* (1861) 10 C. B. (N.S.) 253.

A disclaimer must be a renunciation by the party of his character of tenant, either by setting up title in another or by claiming title in himself: *Doe d. Williams & Jeffrey v. Cooper* (1840) 1 M. & G. 135, 139, per Tindall, C.J.

If he does so or claims a greater estate in a Court of record than his own there will be a forfeiture and the person entitled in reversion may enter: *Shep. Touch.* 125.

But a term is not forfeited by an act *in pais*, such as the tenant taking a title from a stranger, but only by his acknowledging by record that the fee is in another than his landlord: *Doe d. Daniels v. Weese* (1848) 5 U. C. R. 589.

Where a tenant delivered up possession of the premises and the lease in fraud of his landlord to a person who claimed under a hostile title with the intention of enabling him to set up that title, and not with the intention that he should hold under the lease, it was held that the term was forfeited: *Doe d. Ellerbrock v. Flynn* (1834) 1 C. M. & R. 137.

But this case turned on the question of fraud; all other cases of forfeiture by disclaimer have been by matter of record. A denial by parol of a landlord's title does not cause a forfeiture of a lease for a term certain, whether under seal or not: *Doe d. Graves v. Wells* (1839) 10 A. & E. 427.

A claim by a tenant to hold the land leased against the landlord as being of right his own, and a refusal to pay rent on the ground that the landlord had no right to it, is a forfeiture of the term and the landlord can at once

maintain ejectment: *Doe d. Nugent v. Hessel* (1845) 2 U. C. R. 194.

One C. B. had leased certain property, and being in possession gave it up for \$60 to the defendant, who claimed that it was his own; this was held clearly a fraud on the landlord by which the lease was forfeited, and that the defendant could not set up C. B.'s rights under it: *Kyle v. Stocks* (1870) 31 U. C. R. 47.

A mere refusal to pay rent is not in itself a disclaimer, though it may be evidence thereof, and where the tenant admits the lease but denies the right of a particular person to the rent, it is not a disclaimer. T. went into possession under a verbal lease from year to year by a married woman of her own property, made with the consent of her husband, by which the rent was to be paid to her. While this tenancy was subsisting the husband denied the right of his wife to make the lease and claimed the rent, which the tenant refused to pay him, alleging that he held the property under the lease from the wife, and that while the lease continued the husband had no right to the land. It was held that though the legal effect of the lease was to create the relation of landlord and tenant between the husband and the tenant, the denial of the husband's right to the rent did not amount to a disclaimer, as by claiming to hold under the lease the tenant in legal effect admitted that the husband was his landlord: *Andrews v. Taylor* (1861) 10 N. B. R. 144.

An attornment by a tenant from year to year to a third person amounts to such a disclaimer of the landlord's title as will enable him to maintain ejectment without any notice to quit: *Throgmorton v. Whelpdale* (1769) Bull. N. P. 96; Cole Ejec. 42.

And where a tenant said "I have no rent for you, because A. B. has ordered me to pay none," this was held evidence of a disclaimer: *Doe d. Whitehead v. Pittman* (1833) 2 N. & M. 673. In ejectment against two persons as landlord and tenant, an admission by the tenant after action brought of an attornment by him to the landlord having taken place before the day from which possession was claimed, was held sufficient evidence of a

disclaimer as against both the defendants: *Doe v. Litherland* (1836) 4 A. & E. 784.

A party who has entered into possession of land under an agreement to purchase, and has refused to accept a deed of the land tendered to him, on the ground that he does not consider the deed a proper one, has not by such refusal so changed the character of his position as tenant at will as to put himself in the position of a trespasser, and he cannot be ejected without demand of possession, for the act is not a disclaimer: *Lewer v. McCulloch* (1875) 10 N. S. R. 315.

A tenant endeavouring to defend his possession by a title adverse to the lessor is not entitled to notice to quit, for this amounts to a disclaimer: *Doe d. Graham v. Edmondson* (1844) 1 U. C. R. 265; *Doe d. Bouter v. Fraser* (1836) 4 O. S. 80.

A defendant in ejectment cannot at the trial first of all compel the plaintiff to prove his title and then set up a tenancy under him. The denial or refusal to admit the title is a disclaimer if the defendant has notice of the nature of the plaintiff's title, and he cannot afterwards rely on the tenancy: *Houghton v. Thompson* (1865) 25 U. C. R. 557; *Wilson v. Baird* (1860) 19 U. C. C. P. 98.

But where the defendant is not asked at the trial to admit or deny the plaintiff's title, and he does neither, but allows it to be proved without cross-examining plaintiff's witnesses or otherwise taking objections to the title as proved, he is at liberty to show title under the plaintiff as tenant for years: *Hartshorn v. Earley* (1860) 19 U. C. C. P. 139.

Where a disclaimer is relied on, it must appear to have been made before or on the day mentioned in the writ as the time when the plaintiff was entitled to possession: *Doe d. Lewis v. Cawdor* (1834) 1 C.M. & R. 398; *Doe v. Long* (*infra*); when the plaintiff claimed title from 1st May, and the defendant on the 26th June wrote saying that the tenancy had ceased for several years, this was held sufficient to dispense with notice to quit: *Doe d. Grubb v. Grubb* (1830) 10 B. & C. 816. Where several

persons joined in letting land, and it was agreed that the rent should be paid to an agent for them, and afterwards one of the lessors, to whom alone in fact the land belonged, demanded rent of the tenant, who said "you are not my landlord," it was left to the jury to say whether he intended that the relation of landlord and tenant did not exist between them, or merely that the rent was to be paid to the agent: *Doe v. Long* (1841) 9 C. & P. 773; where the lessor had made a void will in consequence of which his heir-at-law demanded rent, and the tenant replied that he had received notice from the other party and would not pay any more rent until he knew who was the right owner, it was held that this did not amount to a disclaimer of the title of the heir-at-law, so as to entitle him to eject without notice: *Jones v. Mills* (1861) 10 C. B. N. S. 788.

B. let land to a tenant from year to year and died leaving an infant heir. The guardian of the child demanded the rent and gave notice to quit. The tenant refused to pay saying she would have kept the land and taken care of the child if she had been allowed, and that she had as good a right to the property as anybody else. After the time mentioned in the notice for giving up possession, the guardian again demanded it. The tenant refused to give up the property, and said she had a better right to it than any one else; it was held that although it might be doubtful whether the first refusal amounted to a disclaimer of the right of the heir, the second refusal being unequivocal was a disclaimer and entitled the heir to recover in ejectment: *Reed v. Brown* (1851) 7 N. B. R. 366.

B. entered into possession of land as tenant from year to year under the trustees of H.'s will and paid rent. Subsequently he claimed as owner under an agreement of purchase made with Mrs. H., who was entitled to the rent during her life. This agreement was repudiated by the trustees and Mrs. H. informed B. that she could not carry it out, but he still insisted on it and refused to pay rent, and it was held that there was such a repudiation of the tenancy as precluded B. relying on

it in an action brought by persons claiming under the trustees: *Peers v. Byron* (1878) 28 U. C. C. P. 250.

A disclaimer by a tenant from year to year of the title of his landlord, or of the person for the time being entitled to the immediate reversion as assignee, heir, devisee, executor, or administrator of the landlord, will operate as a waiver by the tenant of the usual notice to quit, and will in effect determine the tenancy at the election of the landlord or other person so entitled: *Doe v. Long* (*ante*); *Doe d. Grubb v. Grubb* (*ante*); *Doe d. Davies v. Evans* (*ante*); *Doe d. Landsell v. Gower* (*ante*); *Claus v. Stewart* (1844) 1 U. C. R. 512; *Doe d. Graham v. Edmondson* (*ante*); *Doe d. Nugent v. Hessell* (*ante*); *Peers v. Byron* (*ante*); *Reed v. Brown* (*ante*); *Doe d. Bouter v. Fraser* (*ante*).

The reason of this is that a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity to end that which he says has no existence: *Doe d. Calvert v. Frowd* (*ante*); *Doe d. Phillips v. Rollings* (*ante*).

Therefore where there is a disclaimer an ejectment or action for possession may be maintained without waiting until the period when the tenancy will expire: and see *Scouler v. Scouler* (1860) 19 U. C. R. 106; *Vivian v. Moat* (1881) 16 Ch. D. 730; *Doe d. Cuthbertson v. Sager* (1838) 6 O. S. 134.

Where possession is demanded from a defendant in ejectment and he, instead of claiming to be a tenant, asserts his right to the fee, he has no claim to a notice to quit as a tenant: *Doe d. McKenzie v. Fairman* (1850) 7 U. C. R. 411.

A tenant or his assignee who brings ejectment against his landlord and attempts to prove a freehold title, thereby disclaims to hold of the landlord and is not entitled to any notice to quit: *Doe d. Jefferies v. Whittick* (1820) Gow. 195.

A disclaimer may be waived by any act of the landlord acknowledging the party as his tenant at a later period, as by a distress for subsequent rent: *Doe d. David v. Williams* (1835) 7 C. & P. 322.

A disclaimer may be distinguished from a surrender in that the act relied upon as a disclaimer must be something more than a mere renunciation of the tenant's title and must amount to a denial of the landlord's title: *Doe d. Wyatt v. Stagg* (1839) 5 Bing. N. C. 564; 4 Ency. Laws of England (1907) p. 589.

### BREACH OF CONDITION.

ARTICLE 113.—The breach of a condition gives the lessor the right of re-entry, a condition being a stipulation for the cesser of a term upon the happening of a prescribed event.

Though a mere covenant gives no right of entry: *Lowther v. Heaver* (1889) 41 Ch. D. 248 [C.A.], the lessor may without any express clause to that effect take advantage of a breach of condition by re-entry or ejectment. But the breach of the condition does not of itself divest the estate of the lessee: *Re Melville* (1886) 11 O. R. 631.

No express right of entry need be reserved in the lease where the term is created either by way of conditional limitation or is to become void on condition subsequent. In either case the lessor or his assigns may re-enter or maintain an ejectment without an express proviso for re-entry: *Harrington v. Wise* (1596) Cro. Eliz. 486; *Pembroke (Earl) v. Berkeley*, Cro. Eliz. (1595) 384, 560; *Millette v. Sabourin* (1886) 12 O. R. 248; *McIntosh v. Samo* (1874) 24 U. C. C. P. 625.

A condition may be contained in the same deed or endorsed upon the deed or may be contained in another deed executed the same day: Com. Dig. tit. Condition (A. 9).

Thus a condition endorsed upon the back of a lease before the sealing and delivery was held of equal force with a condition within the deed: *Griffin v. Stanhope* (1617) Cro. Jac. 456; *Goodright d. Nicholls v. Mark* (1815) 4 M. & S. 30.

Conditions are most properly created by using the word "condition" or the words "on condition," but the



word commonly used is "provided": Shep. Touch. 122; Co. Lit. 146.

The lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal, unreasonable or repugnant to the grant itself: and upon the breach of any of these conditions may avoid the lease: *Doe v. Pritchard* (1833) 5 B. & Ad. 766; 2 N. & M. 489; *Stansfield v. Mayor Portsmouth* (1858) 4 C. B. N. S. 120; 27 L. J. (C.P.) 124; *Baylis v. Le Gros* (1858) 4 C. B. N. S. 537, 539; 6 Id. 552.

Although no precise form of words is necessary to create a condition, yet where a lease containing no express proviso for re-entry was made "subject to the following stipulations," and the fifth stipulation was that the lessee should not assign the lease without the consent in writing of the lessor, it was held that the words "subject," etc., had not the effect of making the stipulation following it conditions so as to cause a forfeiture and right of entry for their breach, some of the stipulations being clearly not the subject of forfeiture: *McIntosh v. Samo* (1874) 24 U. C. C. P. 625.

Where there is a conditional limitation, the term expires through the intrinsic force of the limitation. A condition operates by reserving a right of re-entry to the grantor and his heirs, and in the event prescribed the estate becomes defeasible by entry: *Re Melville (ante)*, per Proudfoot, J.

A proviso or condition differs from a covenant in this that the former is in the words of and binding upon both parties, whereas the latter is in the words of the covenantor only. It is a rule in provisos that where a proviso is that the lessee shall perform or not perform a thing and no penalty is annexed to it, that is a condition, otherwise it would be void, but if a penalty is annexed it is a covenant: *Simpson v. Titterell* (1591) Cro. Eliz. 242.

In a lease there was a clause as follows: "provided always, and these presents are upon this express condition, that every underlease executed during the term shall be left with the solicitor of the ground landlord for

the purpose of registration," etc.; it was held by Grove, J., that this was a covenant and not a condition. Lindley, J., held that it was at all events a covenant within the meaning of the contract between the parties for the sale of the term under which the vendee was only bound to accept a lease with usual covenants: *Brookes v. Drysdale* (1877) 3 C. P. D. 52; 37 L. T. 467.

The following words in an agreement for letting do not create a condition: "The tenant hereby agrees that he will not underlet the premises without the consent in writing of the landlord": *Shaw v. Coffin* (1863) 14 C. B. N. S. 372; *Crawley v. Price* (1875) L. R. 10 Q. B. 302.

Where in an agreement to demise land for a term of years at a certain annual rent, there was a stipulation (but no clause of re-entry) "that in case the said lessor should want any part of the land to build or otherwise, or cause to be built, then the lessee shall give up that part of the said land as should be requested by the lessor by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence at a fair valuation as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do," it was held that this was merely a covenant and not a condition: *Doe d. Wilson v. Phillips* (1824) 2 Bing. 13; *Doe d. Wilson v. Abel* (1814) 2 M. & S. 541.

But where a proviso in a lease was that in case the lessor at any time shall be desirous of having any part of the land delivered up to him, and shall give three months' notice, the lessee covenants to give it up and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely: *Doe d. Gardner v. Kennard* (1848) 12 Q. B. 244.

But where it "was stipulated and conditioned that the lessee should not assign, transfer, or underlet any of the lands demised otherwise than to his wife, child or children," this was held to create a condition for breach of which the lessor might maintain ejectment: *Doe d. Henrick v. Watt* (1828) 8 B. & C. 308.

A lease contained the following proviso: "That if at any time within the said term the said party of the second part shall become insolvent or remove, or attempt to remove, his goods and chattels from off the said premises without leaving thereon sufficient to answer the then current year's rent, or if by any writ of execution or attachment issued against the said party of the second part, there shall not be sufficient goods and chattels of the said party of the second part to answer the said writ of execution or attachment and pay the current year's rent, the same shall, immediately on the happening of any or either of these events, become due and payable, and the said term shall immediately become forfeited and void, and this agreement is an express condition of this demise." The lessor brought an action against the sheriff for seizing and selling goods on an execution against the tenant when rent was due, and without satisfying the same after notice. It appeared that the officer who seized on 9th September made no inventory and did not leave any one in possession, and on 1st October, when the actual seizure was made, the rent had fallen due by effluxion of time. It was held that if there was sufficient on the premises to satisfy the execution and rent, the clause for forfeiture would not operate in consequence of anything done on 9th September: *Hart v. Reynolds* (1864) 13 U. C. C. P. 501.

The lease considered in *Soper v. Littlejohn* (1901) 31 S. C. R. 572; 22 C. L. T. 45, reversing *Littlejohn v. Soper* (1901) 1 O. L. R. 172 [C.A.], which was to a joint stock company, was to become void if the lessee should make any assignment for the benefit of creditors, and six months' rent was immediately to become due. The lessors, who were shareholders, moved and seconded a resolution to assign, and when the assignment was made executed it as creditors assenting thereto. The lessors then elected to forfeit the lease. It was held that they could do so: they and the company were distinct legal persons and their individual interests were not affected by their action: *Saloman v. Saloman* [1897] A. C. 22, followed.

A provision that a Crown lease is to be forfeited and become void if the lessee should cease to carry on mining operations on the premises for a certain period is only a condition of forfeiture of which the lessor may or may not take advantage as he desires, and until he does an act establishing the forfeiture the term is not ended: *Quesnel Forks Gold Mining Co. Ltd. v. Ward et al.* [1919] 3 W. W. R. 946 [P.C.—B.C.].

Attempts to keep the term in existence for the purpose of making a distress and at the same time to declare it forfeited in all other respects are discussed at p. 418, *ante*.

Proceedings for compulsory liquidation under the Insolvent Act of 1869 were held to avoid a lease, providing that the same should be void, if the term were at any time seized or taken in execution or in attachment by any creditor of the lessee, or if the lessee, becoming bankrupt or insolvent, should take the benefit of any Act that might be in force for bankrupt or insolvent debtors: *Kerr v. Hastings* (1875) 25 U. C. C. P. 429.

But where a lease contained a proviso making it absolutely void if the lessee should become insolvent "and unable in circumstances to go on with the management of the farm," the Court doubted whether the attainder of the tenant for felony was a forfeiture of the lease; but held that if it were a breach of the condition it was contemporaneous with the conviction and was not continuing: *Doe d. Griffith v. Pritchard* (1833) 5 B. & Ad. 765.

In *McIntosh v. Leckie* (1906) 13 O. L. R. 54; 8 O. W. R. 490; 26 Occ. N. 804 [Boyd, C.], a lease which gave the plaintiff the exclusive right to drill on certain oil lands for five years from December 16th, 1903, provided that it was "to be null and void and no longer binding . . . if a well is not commenced . . . within six months . . . unless the lessee shall thereafter pay yearly to the lessor \$50 for delay." The six months had expired on June 16th, 1904, without a well having been drilled. The plaintiff on July 8th, 1904, paid \$50 by cheque cashed on August 10th, 1904. In August, 1905, the plaintiff ten-

dered a second \$50, which was refused. It was held that he had until December 16th, 1905, to pay [see Art. 38], and his lease was not forfeited.

In *Re Snure and Davis* (1902) 4 O. L. R. 89 [Div. Ct.], it was held on the facts that a chattel mortgage given was given by the tenant's mother.

A lease provided that if the premises became and remained vacant for ten days without the written consent of the lessors it should cease and be void, the term expire and be at an end and the lessor be at liberty to re-enter. The lessor entered, remained in possession two years and then moved out leaving the premises vacant for over ten days, and claimed the lease was at an end. Boyd, C., held that the agreement was a subsequent condition: that a breach could only avoid the lease at the election of the lessors and the term was not at an end: *Palmer v. The Mail Printing Co.* (1897) 28 O. R. 656.

### BREACH OF COVENANT.

ARTICLE 114.—Re-entry for breach of covenant can only be exercised when a right is expressly reserved to that effect in the lease or given by statute.

[Authorities: *Lowther v. Heaver* (1889) 41 Ch. D. 248 [C.A.]; *Fetherstone v. Bice* [1917] 1 W. W. R. 224 [Alta.—Walsh, J.], but see *Litvinoff v. Kent* (1918) 34 T. L. R. 298.

“ ‘In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms however clear and explicit, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the options of the lessors’: *Davenport v. The Queen* (1877) 3 A. C. 115, at p. 128. Some of the cases referred to in this decision of the Judicial Committee are *Roberts v. Davey* (1833) 4 B. & Ad. 664; *Pennington v. Cardale* (1858) 3 H. & N. 656; *Hughes v. Palmer* (1865) 19 C. B. N. S. 393, 407,” per Riddell, J., in *Matthewson v. Burns* (1863) 30 O. L. R. 186, at p. 205 (App. Div.); per Duff, J., in *Paulson v. The King* (1915) 52 S. C. R. 317; 9 W. W. R. 1099, at p. 1110.

An action may be brought on a covenant to pay rent without any prior demand; but no action can be brought to recover possession of the premises for non-payment of rent unless there be some express condition or proviso in the lease giving the lessor a right to re-enter and determine the tenancy for such non-payment: *Doe d. Dixon v. Roe* (1849) 7 C. B. 134.

### *Damages.*

Although a mere breach of covenant not fortified by a proviso for re-entry applicable to such covenant will not, as we have seen, enable the lessor to enter or maintain ejectment during the term, he may have an action for damages: *Doe d. Willson v. Phillips* (1824) 2 Bing. 13; 9 Moo. 46; *Doe d. Raines v. Kneller* (1829) 4 C. & P. 3; *Doe d. Darke v. Bowditch* (1846) 8 Q. B. 973; *Comber v. Lemay* (1876) M. R. [Temp. Wood] 35; *Shaw v. Coffin* (1863) 14 C. B. (N.S.) 372.

And where a right of forfeiture existed but has been waived [see p. 741, *post*], the claim for damages will be given effect to: *Straus Land Corporation Ltd. v. International Hotel Windsor Ltd.* (1918) 45 O. L. R. 145.

In this latter case the claim was for breach of a covenant to repair, and the measure of damages in such a case is discussed at pp. 637 and 647 (*ante*).

### *Restraining Breaches of Covenant.*

The Court has frequently exercised jurisdiction to restrain a breach of covenant in a lease by injunction: *Drew v. Guy* [1894] 3 Ch. 25; *Altman v. Royal Aquarium* (1876) 3 Ch. D. 228; *Cockburn v. Quinn* (1890) 20 O. R. 519; *Spencer v. Bailey* (1893) 9 T. L. R. 634; 69 L. T. 179; *Hersey v. White* (1893) 9 T. L. R. 335; *Wiltshire v. Cosslett* (1889) 5 T. L. R. 410; *Arnold v. White* (1856) 5 Grant, 371; and it will do so even where there is a right of re-entry in respect of the breach sought to be restrained: *Lancey v. Johnston* (1881) 29 Grant 67.

Breaches of a covenant to repair have already been referred to: Article 104; and the breach or intended

breach of a covenant not to assign or sublet without leave have been restrained: *Bridemere Hospital v. Fawker* (1892) 8 T. L. R. 637.

But the court will not superintend the performance of a series of acts, and refused an injunction to restrain a lessee from removing goods and chattels from the demised premises in violation of a covenant in a lease to keep thereon sufficient goods to answer a distress for four months' rent: *Hill v. Fraser* (1914) 29 W. L. R. 458; 7 W. W. R. 131; 18 D. L. R. 1; 7 Alta. L. R. 464 [Hyndman, J.] following *Phipps v. Jackson* (1887) 56 L. J. (Ch.) 550 [where the covenant was "at all times during the tenancy to keep a sufficient stock of sheep, horses and cattle"].

*Nimmons v. Gilbert* (1907) 6 W. L. R. 531 [N.W.T.—Stuart, J.] granted an injunction to enforce a negative covenant in the lease of a quarry—"that the lessees will not . . . put more than ten men in the quarry without the lessor's consent." He held that he was bound by *Doherty v. Allman* (1878) 3 A. C. 720; and *McEachren v. Colton* [1902] A. C. 104.

### *The Rights of Re-entry Given by Statute.*

These have already appeared at p. 162, *ante*.

### *Affirmative and Negative Covenants.*

The proviso for re-entry should be so framed as to be applicable to the particular breach. If the covenant be to do an act, a right of entry should be given on non-performance. If on the other hand, the covenant be *not* to do an act, then the proviso should be made to apply on the doing of that act, or otherwise on breach of the covenant.

It is of no consequence whether a condition or covenant is affirmative or negative where there is a right of re-entry so expressed as to apply to both: *Wadham v. Postmaster-General* (1871) L. R. 6 Q. B. 644; 40 L. J. (Q.B.) 310; nor is it of any consequence whether the words of a lease are in the form of a condition or of a

covenant or agreement where there is a right of re-entry: per Wilson, C.J., in *Longhi v. Sanson* (1882) 46 U. C. R. 449, discussed at p. 930, *post*.

The necessity for following the above rule and the distinction between *affirmative* and *negative* covenants appears from a consideration of the following cases:

A proviso granting a power of re-entry if the lessee "shall do or cause to be done" any act in breach of covenant, etc., does not apply to a breach of a covenant to repair, the omission to repair not being an act done within the proviso: *Doe v. Stevens* (1832) 3 B. & Ad. 299.

So a right of re-entry, if the defendant make default in performance of any of the clauses after notice, does not apply to the breach of a negative covenant not to allow alterations in or permit new buildings on the premises without permission: *Doe d. Palk v. Marchetti* (1831) 1 B. & Ad. 715; *Croft v. Lumley* (1858) 6 H. L. Cas. 672.

In *Lee v. Lorsch* (1876) 37 U. C. R. 262, it was held that a proviso for re-entry on "non-performance of covenants," etc., applied only to positive and not negative covenants.

A covenant to "observe and perform" certain provisions, etc., is an affirmative one: *Barrow v. Isaacs* [1891] 1 Q. B. 417; 60 L. J. (Q.B.) 179 [C.A.].

A clause of re-entry on "non-performance" of the covenants in a lease does not apply to negative covenants or covenants not to do certain things. It extends only to acts which the lessee has undertaken to do and fails in doing: *Evans v. Davis* (1878) 10 Ch. D. 747. But a proviso for re-entry in case the lessee should not "observe, perform and keep" the covenants in the lease extends to the breach of negative covenants: *Id*.

A proviso for re-entry "in case the lessees should fail in the observance or performance of the covenants on their part" would seem to apply to affirmative covenants, and not to a covenant to refrain from doing a particular act, such as not to assign without leave: *West v. Dobb* (1870) L. R. 5 Q. B. 460 (Ex. Ch.); 39 L. J. (Q.B.) 190.



Where the right was given on the lessee "wilfully failing or neglecting to perform," etc., the Court was of opinion that the only right of re-entry was in respect of affirmative covenants: *Hyde v. Warden* (1877) 3 Ex. D. 72 [C.A.].

A lease contained covenants against carrying on certain trades and "not to assign or under-lease the premises" without consent, and there was a proviso for re-entry if the lessee should not "perform and keep all and singular the covenants, conditions and agreements" thereinbefore contained, to be observed, performed and kept; and it was held that this proviso extended to a negative covenant: *Timms v. Baker* (1883) 49 L. T. 106.

Where a lessee covenanted that "no spirits of any kind should be sold or allowed to be sold" on the demised premises, and that he would, if required by the lessor, "quit, leave, and absolutely vacate the premises and the lease shall terminate," it was held that there was a right to re-enter in respect of negative covenants: *Longhi v. Sanson* [p. 716, *ante*].

A lessee covenanted to pay rent, to repair and not to assign or sublet without leave with a proviso for re-entry "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed. . ." It was held that this applied to breaches of negative as well as affirmative covenants, and a sublease was held to be a ground of forfeiture. The Court held that the word "performed" was an apt word to describe the keeping of a promise or the observing of an obligation, and had not necessarily an active meaning: *Harman v. Ainslie* [1903] 2 K. B. 241; [1904] 1 K. B. 698 [C.A.]; 20 T. L. R. 356 [C.A.]; (1904) 24 C. L. T. 151.

Compare *McMahon v. Coyle*, decided under the Short Forms Act: see p. 1115, *post*.

In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will in a

proper case enforce the negative portion of the covenant: *Clegg v. Hands* (1890) 44 Ch. D. 503; 59 L. J. (Ch.) 477 (C.A.).

The effect of the decision in *Harman v. Ainslie* is to extend the proviso for re-entry to cases where there has been non-performance of negative covenants which the lessee has covenanted to "perform."

A lessee of hotel premises who had covenanted not to do or suffer anything to be done on the premises by which the license might be forfeited, obtained a similar covenant from his sub-lessee. The latter was afterward guilty of an offence which resulted in the loss of his license. It was held that the lessee had not suffered this act to be done: *Wilson v. Twamley* (1903) 19 T. L. R. 504; 23 C. L. T. 259; [1904] 2 K. B. 99; 73 L. J. (K.B.) 703; 20 T. L. R. 440 [C.A.].

### *Insensible Provisos.*

Where a lease gave a right of entry on breach of the covenants thereafter contained and the lessee's covenants were before the proviso, it was held not applicable thereto: *Doe d. Spencer v. Godwin* (1815) 4 M. & S. 265.

A lease for the term of three years contained the following words: "Proviso for re-entry on non-payment of rent or non-payment of covenants." Held, that, the latter words being insensible, no power of re-entry on breach of a covenant to summer fallow was conferred by the lease: *Doe d. Wyndham v. Carew* (1841) 2 Q. B. 317, and *Doe d. Spencer v. Godwin* (*supra*), referred to: *Fetherston v. Bice* [1917] 1 W. W. R. 224 [Alta.—Walsh, J.].

And see also, *Re Just and Stewart* (1913) 24 W. L. R. 433; 4 W. W. R. 780; *Re McLaren v. Kerr* (1878) 39 U. C. R. 507, and *Alexander v. Walters* (1909) 10 W. L. R. 441 [B.C.—Morrison, J.].

### *There Should be a Clear Breach.*

In *Watson v. Moggey* (1905) 15 M. R. 241; 1 W. L. R. 438 [Ct. en B.], it was held there had not been such a

clear breach of a covenant to do work on a farm as to entitle the landlord to declare the lease forfeited. In his lease a tenant covenanted to buy certain horses from his landlord and to pay for them by doing certain work on the land, and in default to pay in cash at the time of threshing. The tenant did some work and the accounts were disputed. It appeared there might be some \$38 due to the landlord. It was held there was not such a clear breach of the covenant as to entitle the landlord to declare the lease forfeited on that ground.

M. leased store premises to the defendant for a term of five years from the 1st November, 1912, covenanting to make certain alterations and repairs and the first month's rent was paid. Upon commencing the alterations it was found extensive structural repairs required to be made or the building demolished. M. was allowed to go on to the premises for the purpose of making the repairs. No further rent was paid. In May, 1913, when the alterations were substantially completed, the plaintiff purchased the reversion and the rents to June 1st were charged against M. in the adjustments, although it was well known no rent had been paid. On June 9th the plaintiff leased the premises for three years to H., a discharged employee of the defendant. On June 10th the defendant took possession. On June 10th the plaintiff obtained an interim injunction and on the motion to continue it claimed that he had a right to re-enter for non-payment of rent. Middleton, J., said [31 O. L. R. p. 326]: "Obviously there had been no sufficient default in payment of the rent accruing due on the 1st June to entitle him to exercise this right," and that he had no right in respect of rent accruing due before [see p. 723, *post*]; *Brown v. Gallagher & Co. Ltd.* (1914) 31 O. L. R. 323; 6 O. W. N. 296; 19 D. L. R. 682.

### *Who May Re-enter?*

No one can re-enter for a forfeiture but the person legally entitled to the rent or the reversion: *Doe d. Barney v. Adams* (1832) 2 C. & J. 232; *Doe d. Barker v. Goldsmith* (1832) 2 C. & J. 674.

But a lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he have no reversion: *Doe d. Freeman v. Bateman* (1818) 2 B. & Ald. 168; *Baker v. Gostling* (1834) 1 Bing. N. C. 19; see *Baynton v. Morgan* (1888) 21 Q. B. D. 105.

A right of entry cannot be effectually reserved to a stranger to the legal estate, although he join in the demise and have some equitable or beneficial estate or interest in the property: *Doe d. Barker v. Lawrence* (1811) 4 Taunt. 23; Lit. s. 347; Lit. 214 (b).

Thus where a lease purporting to be made by R. W., as attorney for A. H., reserved a right of re-entry by the said R. W. into the demised premises: A. H. was seized of the reversion, but the reservation to R. W. did not say "as such attorney," nor add to his heirs or assigns, and this was held a reservation to R. W., personally and invalid: *Hyndman v. Williams* (1858) 8 U. C. C. P. 293.

Independently of the Judicature Act, where there is a lease by a mortgagee and mortgagor, and a right of re-entry reserved to them, or either of them, it enures only to the mortgagee and not to both: *Doe d. Barney v. Adams* (*supra*); *Moore v. Plymouth* (1817) 3 B. & Ald. 66; 7 Taunt. 614; and the same rule applies to the case of a demise by a trustee and *cestui que trust* or tenant for life and reversioner: *Doe d. Barker v. Goldsmith* (*supra*).

It would seem, however, that where the mortgage contains a re-demise or creates a tenancy between the mortgagor and mortgagee, the right of entry would enure to the former or might be reserved in his favor, for he would be the immediate reversioner, provided the mortgage were executed by the mortgagee: *Holland v. Vanstone* (1867) 27 U. C. R. 15; *Harmer v. Bean* (1853) 3 C. & K. 307.

A reversioner who has parted with his reversion either absolutely or by way of mortgage could not formerly re-enter or maintain ejectment for a forfeiture: *Fenn d. Matthews and Lewis v. Smart* (1810) 12 East,

444; *Doe d. Linsey v. Edwards* (1836) 5 B. & Ad. 1065; *Doe d. Prior v. Ongley* (1850) 10 C. B. 25.

But it would seem that under the provisions of the Judicature Acts (noted at p. 372, *ante*), a mortgagor entitled to possession might re-enter before any notice given by the mortgagee for the purpose of invalidating the mortgagor's right. So where the mortgage creates a tenancy between the mortgagor and mortgagee. A lessor cannot re-enter for a forfeiture after his reversion has been merged and extinguished: *Webb v. Russell* (1789) 3 T. R. 393-402.

But where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, it would seem that the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor: *Hyde v. Warden* (1877) 3 Ex. D. 72; 47 L. J. (Q.B.) 121 [C.A.].

At common law, no one but the grantor could re-enter for a forfeiture; and no grantee or assignee of the reversion could take the benefit or advantage of a condition for re-entry: Lit. s. 374; Co. Lit. 214.

### *The Statutes.*

By (1540) 32 Hen. VIII. c. 34, s. 1, all grantees of the reversion, their heirs, executors, successors and assigns, shall have like advantage against the lessees, their executors, administrators and assigns, by entry for non-payment of rent, or for doing waste or other forfeiture; and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases as the lessors or grantors themselves had.

### *Similar Legislation.*

Ontario: R. S. O. 1914, c. 155, s. 4.

Saskatchewan: 9 Geo. V. c. 79, s. 3.

The Act applies to leases by deed only, for agreements by parol cannot run with the land. Therefore

where a lease is not under seal an assignee of the reversion cannot sue upon the contract: *Standen v. Christmas* (1847) 10 Q. B. 135. But the lessor may sue in the same manner as if he had not assigned the reversion: *Bickford v. Parson* (1848) 5 C. B. 920.

The words "or other forfeiture," although general, do not extend to every breach of condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for not doing of waste, for keeping the houses in reparación, for making of fences, scouring of ditches, for preserving of woods or such like; and not for the payment of any sum in gross, delivery of corn, wood or the like: Co. Lit. 215 (b), (12th resolution); Shep. Touch. 176.

Where a tenant forfeits his estate by becoming insolvent, or by being attainted of felony, it seems that such forfeiture is not one whereof an assignee of the reversion may take advantage by the statute: *Doe d. Griffith v. Pritchard* (1833) 5 B. & Ad. 765; but see *Hammond v. Colls* (1845) 1 C. B. 916; and the Criminal Code, s. 1033 [proviso].

An assignee of the reversion cannot enter except for breaches while he holds the estate: *Crawford v. Bugg* (1886) 12 O. R. 8.

A lessee covenanted to complete certain partly erected houses, and also to keep them in repair; the reversion was afterwards assigned, and it was held that whether the assignee could maintain ejectment for non-completion or not, he could do so for the subsequent non-repair, for that was a continuing breach: *Bennett v. Her-ring* (1857) 3 C. B. N. S. 370.

The grantee of the reversion cannot avoid the lease for a forfeiture committed before his title accrued, nor can the lessor avoid the lease after he has parted with the reversion: *Matthews and Lewis v. Smart* (ante); *Doe d. Linsey v. Edwards* (1836) 5 B. & Ad. 1065; *Doe d. Prior v. Ongley* (1850) 10 C. B. 25; nor will the lessee be allowed to take advantage of his own wrongful act or omission and to say that thereby the lease has become void: *Rede v. Farr* (1817) 6 M. & S. 121; *Doe d. Bryan v.*

*Bancks* (1821) 4 B. & Ald. 401; *Henderson v. Torrance* (1845) 2 U. C. R. 402.

The other statutes considered at p. 1090, *post*, are important in this consideration.

In *Brown v. Gallagher* (1914) 31 O. L. R. 323 [Middleton, J.], it was held that an assignee of the reversion could not re-enter for non-payment of rent when the default was made before he purchased the land: *Cohen v. Tanner* [1900] 2 Q. B. 609, referred to. Section 5 of the Landlord and Tenant's Act [see p. 1090, *post*] was considered, and it was pointed out that the law had been changed in England by the Conveyancing Act of 1911, but that the section of the English Act adopted as s. 5 was not in the amended form.

As we have already seen, an assignee of part of the reversion in the whole land is an assignee within the statute and may take advantage of a condition broken in his time. But an assignee of the reversion in part of the land is not, for the condition being entire cannot be apportioned by the act of the parties: *Wright v. Burroughs* (1846) 3 C. B. 685. There is a difference in this respect between a condition and a covenant, for an assignee of the reversion in part of the land may sue on a covenant for not repairing that part: *Twynam v. Pickard* (1818) 2 B. & Ald. 105; *Simpson v. Clayton* (1838) 4 Bing. N. C. 758-786; *Badeley v. Vigurs* (1854) 4 E. & B. 71; and an assignee of the term in part of the land may maintain an action for breach of covenant as to that part: *Palmer v. Edwards* (1783) 1 Doug. 121.

### *Suspension of the Right.*

A landlord cannot during the currency of the lease and before the expiration of the term re-enter for non-payment of rent for which he has distrained on goods and chattels still held by him under the distress: *Whittaker v. Goggin* (1908) 38 N. B. R. 378; 4 E. L. R. 530.

### *The Entry.*

Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the

lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease: *Pigeon v. Preston* (1912) 3 W. W. R. 694 [Sask.—Newlands, J.]; *Fenn d. Matthews and Lewis v. Smart* (1810) 12 East, 444, 451; *Arnsby v. Woodward* (1827) 6 B. & C. 519; 9 D. & R. 536; *Roberts v. Davy* (1833) 4 B. & Ald. 664; *Baylis v. Le Gros* (1858) 4 C. B. N. S. 537; 6 Id. 552. And the lease will be avoided from that time only: *Cole Ejec.* 408. Formerly there appears to have been a distinction in this respect between a lease for lives and a lease for years: 1 Inst. 214.

Perhaps an actual entry should be made before action to avoid a freehold lease; but the action itself is sufficient to avoid a lease for years: *Cole Ejec.* 403.

A notice to quit on a certain date is no evidence of a re-entry because it allows the tenant to remain until that date: *Pigeon v. Preston* (*supra*).

Repossession of the premises may be effected “either by taking physical possession or by acquiring possession by means of some possessory action or proceeding”: per Mulock, C.J.Ex., in *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466, at p. 473.

The lessor may enter and take actual possession at any time after the forfeiture has accrued and before he has waived such forfeiture but not afterwards: *Roe v. Southard* (1861) 10 U. C. C. P. 488; *Leighton v. Medley* (1882) 1 O. R. 207; *Davis v. Burrell* (1851) 10 C. B. 821; *Arnsby v. Woodward* (1827) 6 B. & C. 519; *Doe d. Griffith v. Pritchard* (1833) 5 B. & Ad. 765.

The bringing of an ejectment for the forfeiture amounts to an election to determine the term from the day on which the plaintiff claims to be entitled to possession so as to prevent the recovery of any subsequent rent: *Jones v. Carter* (1846), 15 M. & W. 718, followed in *Wheeler v. Keeble* (1914) Ld. [1920] 1 Ch. 57; 88 L. J. (Ch.) 554, which dissented from *Read v. Wotton* [1894] 2 Ch. 171; *Franklin v. Carter* (1845) 1 C. B. 750; 14 L. J. (C.P.) 241.

The action to recover possession is equivalent to the ancient entry and dispenses with an actual entry. It



asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter: *Denison v. Maitland* (1892) 22 O. R. 170.

Where on 21st July the lessor brought ejectment for breaches of covenants which took place before 24th June and after the commencement of the action but before trial distrained for rent due up to 24th June, it was held that the distress did not prevent the plaintiff from relying at the trial on any breach of covenant before 24th June, the plaintiff not having confined himself in his particulars as to the breaches of covenants: *Grimwood v. Moss* (1872) L. R. 7 C. P. 360; 41 L. J. C. P. 239; see, however, *Ex parte Dyke* (1882) 22 Ch. D. 410, where there was a long discussion in the Court of Appeal as to whether the action was equivalent to actual entry.

*Grimwood v. Moss* was approved in *Sarjeant v. Nash, Field & Co.* [1903] 2 K. B. 304 [C.A.]; 19 T. L. R. 510; 23 C. L. T. 260; and both cases were followed in *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466 [App. Div.].

Where the cause of a forfeiture is complete, the bringing of an action for recovery of possession is equivalent to actual entry: and a landlord who brings action is in the position of having re-entered on the day he commenced his action: *Grimwood v. Moss* (*supra*); *Ware v. Booth* (1894) 10 T. L. R. 446, followed; *Nichol v. Nelson* (1911); 19 W. L. R. 718 [Lamont, J.]; 4 Sask. L. R. 315; 1 W. W. R. 423.

And the institution of the summary proceedings taken under the provisions of the Ontario Landlord and Tenant's Act set out at p. 926, *post*, was held to be an unequivocal exercise of the lessor's option to determine the lease: *Re Bagshaw and O'Connor* (*supra*).

One G., a rector, in 1861 leased land for twenty-one years at an annual rent, with a proviso for re-entry on non-payment. The lessee entered and paid rent until the summer of 1865, when he went away from the country, leaving a year's rent overdue and giving the key to a person in the adjoining house. In July, 1866, the premises being then vacant, G. went to England, leaving a

power of attorney with his son, authorizing him to collect and distrain for his rent, and to commence and prosecute all actions and other proceedings which might be expedient to be done or prosecuted about the premises as fully as if he were present. Defendant in some way got the key and went in and afterwards obtained a lease from G.'s son for twenty-one years. G., on his return in 1866, recognized this lease and received rent under it regularly from defendant until 1868, when the lessee brought ejectment claiming under his lease from G., and it was held that the facts showed a sufficient re-entry by G. to avoid plaintiff's lease: *O'Hare v. McCormick* (1870) 30 U. C. R. 567.

A. leased a mill for a term of years to B., C. and D., who covenanted to pay the rent without default, otherwise the deed to be null and void, and A. covenanted that they should hold quiet possession of the premises during the term, provided they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up, and afterwards obtained the key from one of the lessees, and A. distrained for rent on such property as he found in the mill, which proved insufficient to pay the rent due. On A.'s refusal to give up possession, the lessees brought ejectment. It was held that the lease being void by reason of the non-payment of rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession: *Doe d. Summers v. Bullen* (1848) 5 U. C. R. 369.

In ejectment against one M., the defendant appeared and defended by order as landlord in lieu of M. The plaintiff claimed under a covenant in a lease from him to M. on the right of re-entry for non-payment of rent and non-performance of covenants. The instrument set up by the plaintiff was in fact an agreement dated 2nd April, 1867, whereby plaintiff agreed to sell the land to M. for £100, M. paying £10 each year and interest at 6 per cent. till the whole was paid, provided that if the payments were not made within one month from time appointed, the interest due was to be considered as rent,

for which the plaintiff might enter and distrain. M. covenanted not to commit waste, etc., and to pay taxes, and in case of default in making the payments for three months, that he should surrender the premises to plaintiff, and M. agreed not to let or assign without leave. It also appeared that the plaintiff held under a lease dated 23rd March, 1865, from defendants for ten years, which gave a right of re-entry for non-payment of rent and taxes, and for assigning without leave, that four years' rent was in arrear, and there was no written authority to the plaintiff to sell to M. The lease also contained besides the general proviso for re-entry a special power to determine the lease on a given notice. In February, 1872, defendants executed a lease to M. for seven years, but no evidence was given to show that it was actually delivered. It was held that under the agreement between the plaintiff and M., the former had the right to re-enter and take possession on default, and the covenant to surrender possession after three months' default could not alter plaintiff's right. It was also held that if it had been shown that defendants were proceeding to re-enter for the plaintiff's default, and M. took the lease from defendants to save himself from eviction, this would be a bar to the plaintiff's right, and there would be no necessity for their putting M. out of possession and his re-entering under this new demise; but as this evidence was wanting, a verdict found in defendant's favor was set aside and a new trial granted: *Hely v. Canada Co.* (1873) 23 U. C. C. P. 20.

On a second trial of this case the defendants proved an admission by M. that he held the land for the defendants after he had first informed them that he held under the plaintiff, and that he and the plaintiff had made improvements thereon, and it was held that the fact of the defendants, with full knowledge of these circumstances, granting a lease to M. with a covenant against incumbrances showed that they were proceeding to enforce the forfeiture against the plaintiff, and that M. attorned to them to avoid eviction; also that defendants coming into this suit and defending as M.'s landlords,

contending that plaintiff's lease was at an end, showed their desire to forfeit it: *Hely v. Canada Co.* (1873) 23 U. C. C. P. 597.

When a lease contains a provision for forfeiture on a certain notice, and also for non-payment of rent, and the landlord gives the notice, forfeits the lease, and brings ejectment before there could be any forfeiture for non-payment of rent, he cannot afterwards set up such non-payment as a forfeiture: *Campbell v. Baxter* (1865) 15 U. C. C. P. 42.

A sub-lease provided for re-entry in the event of the sub-lessee permitting an execution to be levied against his goods. This event happened and the sub-lessor distrained through the sheriff, who was in possession under the execution when the lessor entered for non-payment of rent. The sub-lessor brought an action for relief from the forfeiture. It was held that his distress and the bringing of the action shewed that the sub-lessor intended to terminate the sub-lease: *Tucker v. Armour* (1906) 5 W. L. R. 35; 6 W. L. R. 93; 6 Terr. L. R. 388 [N.W.T.—Full Ct.].

Non-payment of taxes is a continuing breach of a covenant to pay and justifies the landlord in re-entering under the proviso to that end, without demand: *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 11 W. L. R. 520; 29 C. L. T. 1177 [Sask.—Lamont, J.]. But see now Article 115.

The manner of entry is discussed at p. 888 (*post*).

### *Registration.*

“In any such case the district registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor, shall note the same by entry in the register and upon the lease, and the estate of the lessee in such land shall thereupon determine, but without releasing the lessee from his liability in respect of the breach of any covenant in such lease, express or implied:” R. S. M. 1913, c. 171, s. 104, (1906) 6 Edw. VII. c. 24, s. 57 [Alta.]; (1917) 7 Geo. V. [2 Sess.] c. 18, s. 95 (1) [Sask.].

## RESTRICTIONS ON THE RIGHT OF RE-ENTRY.

ARTICLE 115.—There is a common law restriction on the right of re-entry for non-payment which has been to some extent relaxed by statute, and in some provinces there are statutory restrictions on the exercise of the right of re-entry.

*Forfeiture for Non-Payment of Rent.*

It has appeared [p. 714 *ante*] that a term limited in the ordinary way will not be forfeited even for non-payment of rent, unless there be a proviso for re-entry in the event of non-payment or a clause for forfeiture or termination of the estate in that event. It has also appeared [p. 162 *ante*] that in some provinces such a proviso is deemed to be included.

*The Demand.*

And every such proviso for re-entry should expressly provide that the right of re-entry may be exercised without the necessity for a demand being made for the rent—as is done by the Short Forms Acts: see p. 1114, *post*.

If there is no such stipulation the very technical requirements of the common law as to a demand and the manner of making must be complied with.

*The Common Law.*

At common law when a landlord claimed a forfeiture for non-payment of rent reserved in a lease, he was obliged to pursue the remedy with great strictness by making a demand of the rent the precise sum due upon the day when it was payable, a convenient time before sunset, and upon the land. If he failed in any one of these requisites he could not enforce the forfeiture. But even at common law, where the lease gave the right of re-entry to the landlord for non-payment of rent, “though no formal or legal demand should be made for payment thereof,” the landlord might maintain ejectment without any entry or demand of rent: *Doe v. Mas-*

ters (1824) 2 B. & C. 490; *Campbell v. Baxter* (1865) 15 U. C. C. P. 47, per Richards, C.J.

The requisites of the demand at common law are:  
1. The demand must be made by the landlord or by his agent duly authorized in that behalf: *Roe v. Davis* (1806) 7 East, 363.

2. It must be made on the very last day to save the forfeiture. Therefore if the proviso for re-entry be on non-payment of rent for thirty days after it becomes due, the demand must be made on the thirtieth day after the rent became due (exclusive of the day on which it became due), and not on any other day before or afterwards: *Doe d. Dixon v. Roe* (1849) 7 C. B. 134.

3. It must be made a convenient time before and at sunset: Co. Lit. 202*a*. It must be continued actively or constructively until sunset: *Acock v. Phillips* (1860) 5 H. & N. 183.

4. It must be made at the proper place. Therefore if the lease or agreement specify the place at which the rent is to be paid, the demand must be made there and not elsewhere: Co. Lit. 202*a*. But if no place be so appointed, the demand must be made upon the land, and at the most notorious place on it: Cole Ejec. 413. Therefore if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house, although the door be open: Co. Lit. 201*b*.

Such demand must actually be made, although there be no person present on behalf of the tenant to answer it: Co. Lit. 201*b*.

5. The demand must be made of the precise sum then payable, and not one penny more or less. If the rent be payable quarterly, and more than one quarter is due, only the last quarter's rent should be demanded, and not the previous arrears, otherwise the demand will be altogether bad: *Doe v. Paul* (1829) 3 C. & P. 613; because it is only in respect of the last quarter's rent that the forfeiture (if any) will accrue, the previous arrears not having been duly demanded on the proper day for that purpose: Cole Ejec. 414.

Unless the lease be within the scope of some of the enactments referred to below or there be express words

therein dispensing with a formal demand of the rent, no entry or action to recover possession can be maintained for non-payment of rent unless there has been a formal demand thereof made according to the strict rules of the common law: *Faugher v. Burley* (1876) 37 U. C. R. 498.

But the contract of the parties may dispense with a demand, and where a lease expressly provides that it shall be void on non-payment of rent, whether demanded or not, the forfeiture of the term is created by the agreement of the parties, and on non-payment the lessor is entitled to possession: *McDonald v. Peck* (1859) 17 U. C. R. 270; *Campbell v. Baxter* (1865) 15 U. C. C. P. 42.

On the other hand, the contract may render a demand necessary. Thus, where an agreement of tenancy contained a clause that if the tenant should "make default in payment of the rent within 21 days after the same shall become due, being demanded, it shall be lawful for the landlord to re-enter without notice to quit or other proceedings," it was held that the rent must be demanded after it had been in arrear for 21 days: *Phillips v. Bridge* (1873) L. R. 9 C. P. 48; 43 L. J. (C.P.) 13. But the common law demand would not be necessary in such case, or even where the lease requires a lawful demand. *Doe v. Alexander* (1814) 2 M. & S. 525.

### *The Statutes.*

It has appeared [at p. 163, *ante*] that in Ontario, New Brunswick and Saskatchewan by statute in every demise, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, *although no formal demand shall have been made thereof*, it shall be lawful for the landlord at any time thereafter, into and upon the demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as of his former estate.

The implied powers to re-enter given by the Land Titles Acts considered at p. 162, *ante*, do not contain any

provision dispensing with a demand which would still seem necessary.

The Short Forms Acts specifically cover the case: see p. 1114, *post*.

The Ontario Landlord and Tenant Act, R. S. O. 1897, c. 170, s. 35, provided that where a landlord has by law a right to enter for non-payment of rent it shall not be necessary to demand the rent on the day when due, or with the strictness required at common law, and a demand of rent shall suffice, notwithstanding more or less than the amount really due is demanded, and notwithstanding other requisites of the common law are not complied with, provided that unless the premises are vacant the demand be made fifteen days at least before entry, such demand to be made on the tenant personally anywhere, or on his wife or some other grown-up member of his family, on the premises.

—The object of this section, apparently, was to modify the rigor of the common law demand where a demand is necessary, but it did not make a demand necessary.

The section was dropped however in 1911, when the statute was revised and consolidated by 1 Geo. V. c. 37, section 19 (1), noted at p. 733 (*post*) taking its place.

See also C. S. N. B. 1903 c. 153, s. 4.

### *The Statutes.*

Before the passing of the Conveyancing and Law of Property Act [Imp.] 1881, a right of re-entry reserved in a lease conditional upon breach of a covenant — such as a covenant to repair—could be enforced by the landlord without the tenant having opportunity to meet the complaint, and often without his knowing that the breach had in fact occurred. “It is true that the Courts of Equity attempted to mitigate the harshness of this procedure, and in several reported cases restrained the landlords from exercising their rights where the breach was one which, by accident or surprise, the tenant had been unable to rectify. There was, however, no general rule relating to such relief on which reliance could be placed. In these circumstances the Conveyancing Act of 1881 was passed . . . ”: per Lord Buckmaster,



L.C., in *Fox v. Jolly* [1916] A. C. 1, at pp. 7, 8; 36 C. L. T. 223.

By the Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, s. 20 (2), "a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease [other than a proviso in respect of the payment of rent] shall not be enforceable by action, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach.

This provision was copied from the Conveyancing and Law of Property Act of 1881 [44-45 Vic. c. 41, s. 14 (1) (Imp.)], and see 55-56 Vic. c. 13, s. 5 (Imp.)]; but the words in brackets were added in 1911.

#### *Similar Legislation.*

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 10 (2): (a) and (b).

#### *Application.*

This section shall apply although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease, in pursuance of the directions of a statute: R. S. O. 1914, c. 155, s. 20 (4).

This provision was not copied in the new Saskatchewan Act, 9 Geo. V. c. 79.

The statutory directions are referred to at p. 163, *ante*.

It has been held that this requirement as to notice applied to summary proceedings taken under the Landlord and Tenant Act [Overholding Tenant Act], see p. 926, *post*; *Re Snure and Davis* (1902) 4 O. L. R. 82 [Div. Ct.].

The notice must be given before a re-entry without action and is not confined to cases of suit to recover

possession: *Greenwood v. Rae* (1916) 36 O. L. R. 367 [App. Div.], following *In re Riggs, Ex p. Lovell* [1901] 2 K. B. 16.

It is not necessary to allege in the statement of claim that the notice was given; the allegation is implied: *Gates v. Jacobs Lim.* [1920] 1 Ch. 567; 89 L. J. (Ch.) 319.

In *Wilson v. Rosenthal* (1906) 22 T. L. R. 233; 26 C. L. T. 207, an unsuccessful attempt was made to distinguish between an action for a mere declaration of forfeiture and an action for re-entry and possession. It was held that the notice was a condition precedent.

Where a notice should be given, but is not, the landlord is a wrong-doer. It does not follow, however, that the tenant is entitled to more than nominal damages—especially where he has committed a breach and the right of re-entry is only suspended. The right exists until the tenant has been relieved, and if he asks for damages only it is unfair that he should be given damages based upon his having been deprived of the use of the premises. See the remarks of Meredith, C.J.O., in *Greenwood v. Rae* (*supra*), at p. 371.

Where a chattel mortgage is given in breach of a provision in a lease, the notice must be given: *Greenwood v. Rae*.

### *The Leases Affected.*

This section shall apply to leases made either before or after the commencement of the Act, and shall apply notwithstanding any stipulation to the contrary: sec. 20 (8).

By section 20 (1) (a), for the purposes of this section, "lease shall include an original or derivative under-lease, and a grant at a fee farm rent, or securing a rent by condition; and an agreement for a lease where the lessee has become entitled to have his lease granted."

By s. 20 (1) (b) "lessee shall include an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, and a grantee under such a grant and his heirs and assigns." By s. 20 (1) (c) "lessor shall include an original or derivative under-lessor, and the heirs, executors, administrators and

assigns of a lessor, and a grantor under such a grant, and his heirs and assigns."

By s. 20 (1) (d), "mining lease" shall mean a lease for mining purposes, that is, a searching for, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away or disposing of mines or minerals and substances in, on or under the land obtainable by underground or by surface working or purposes connected therewith, and shall include a grant or license for mining purposes.

By s. 20 (1) (e) "'under-lease' shall include an agreement for an under-lease, where the under-lessee has become entitled to have his under-lease granted."

By s. 20 (1) (f), "'under-lessee' shall include any person deriving title under or from an under-lessee."

Section 20 (5), provides that "for the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach."

### *Similar Legislation.*

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 10 (7), ss. (1), pars. 1 to 5 (no counterpart to 20 (1) (d); s. 10 (4).

An agreement for a lease of which specific performance would not be decreed [see p. 105 *ante*] is not a lease within the Act, and therefore the Act does not apply to a mere tenancy under an agreement for a lease where there is no actual lease in existence nor any title to specific performance: *Swain v. Ayres* (1888) 21 Q. B. D. 289 [C.A.], affirming *Charles, J.*, 20 Q. B. D. 585.

This decision is considered and criticised by Mr. E. D. Armour, K.C., in (1888), 8 C. L. T. p. 249.

But an agreement of which the Court will decree specific performance is within the Act. A. agreed to grant to B. a lease of a number of houses which the latter

was building for the former. The houses were not built within the time specified in the agreement, but after the time fixed for completion A. demanded rent which B. paid, A. giving a receipt without prejudice to any past breach of covenant. The demand for rent not being made "without prejudice," it was held with the payment to establish B.'s right to the leases, notwithstanding the delay in completion and the receipt, for after the demand it was too late to negative B.'s position as tenant. There being therefore a right to specific performance of the agreement the leases were treated as actually existing and B. was held entitled to the benefit of the Act: *Strong v. Stringer* (1889) 61 L. T. 470; 5 T. L. R. 638.

*The Covenants or Conditions to which the Statute does not Apply.*

By s. 20 (9) "this section shall not extend (a) to a covenant or condition, against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee; or [on the lessee making an assignment for the benefit of creditors under the Assignments and Preferences Act], or on the taking in execution of the lessee's interest or (b) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof."

The words in brackets were added in 1911.

The statute originally contained the following provision [R. S. O. 1887, c. 143, s. 11 (7); R. S. O. 1897, c. 170, s. 13 (7)].

"This section shall not affect the law relating to re-entry, forfeiture or relief in cases of non-payment of rent."

In 1911 [1 Geo. V. c. 37, s. 20] this was omitted and the exception contained in s. 20 (2), p. 733, *ante*, was inserted. Notice is not required in case of forfeiture for non-payment of rent, but relief may be given in such cases, see p. 760, *post*.

It has been held that these instances are mentioned as illustrations and do not exclude other covenants and conditions of a like nature, if they are incapable of remedy and not subject to compensation in money. Thus—in a case decided before the words printed in brackets were added—where a lease contained a clause accelerating the payment of rent and providing for a forfeiture of the term, if the lessee should make any assignment for the benefit of creditors, on such assignment being made it was held that the Act did not apply: *Argles v. McMath* (1894) 15 C. L. T. 85; 31 C. L. J. 210; 26 O. R. 224 [Div. Ct.]; *Re Walker, Ex parte Gould* (1884) 13 Q. B. D. 454; 51 L. T. 368.

### *The Notice.*

The Act gives no form of notice, but it has been held in Ontario that any notice specifying the particular breach with reasonable certainty will be sufficient. Thus where the landlord wrote to the tenant complaining that the latter was cutting wood in the woods without authority, and warning him not to cut in any place without being instructed by the landlord, a notice was afterwards given that the tenant had broken the covenants in the lease and claiming compensation; this was held sufficient: *McMullen v. Vannatto* (1893) 24 O. R. 625.

But in *Fletcher v. Nokes* [1897] 1 Ch. 271, it was held that the section was passed to place the tenant in a better position and that he was entitled to receive in his notice the same particulars the landlord would have been compellable to give in an action for breach of covenant.

These two decisions are contrasted in (1897) 17 C. L. T. at p. 96, where it is also pointed out that the fact that the tenant happens to know what is wanted does not avail the landlord “for, if it did, he could always proceed without notice in the teeth of the statute by proving that the defendant knew of the breach.”

When a lessor has given notice under a special covenant to repair within three months after notice, he may

before the expiration of the three months give notice under the above Act, where the lessee has in the meantime taken no steps to comply with the first notice: *Cove v. Smith* (1886) 2 T. L. R. 778.

The receipt, after the notice, of rent due before, will not affect it. A notice requiring a tenant to remedy a breach of covenant by repairing premises within three months expired on the 1st of February, 1884. No repairs were then executed, and on February 2nd the rent due at Christmas, 1883, was accepted, and this was held no waiver of the breach of covenant: *Cronin v. Rogers* (1884) C. & E. 348.

The notice need not necessarily ask for compensation in money, though it must inform the lessee what the lessor wants done. Where there is a breach capable of remedy the lessor should in the notice require the lessee to remedy the breach; if he does not he cannot ask for compensation in money: *Lock v. Pearce* [1893] 2 Ch. 271; 62 L. J. Ch. 582 (C.A.); [1892] 2 Ch. 328; *North London Land Co. v. Jacques* (1883) 32 W. R. 283, disapproved.

In *Re Smure and Davis* (1902) 4 O. L. R. 82; 22 C. L. T. 234; 1 O. W. R. 379 [Div. Ct.], the notice was held insufficient in that it did not specify the breach or covenant, but was merely a demand of possession on the ground that the lease and right of occupation thereunder had been determined and ended by breach of covenant.

Where a lessee, under a building lease, had erected five houses and notice of dilapidations given as to one only had not been complied with, the lessor commenced an action for possession of all the houses. An objection that the action must fail as the notice related only to a portion of the premises was overruled: *McCardie, J.*, however, said [88 L. J. K. B.] at p. 261: “. . . but I desire to say that this rigid exercise of the right of a landlord so to limit his notice does not receive my approval. If a demised property consist of five contiguous houses, it is desirable from every point of view, that the notice should specify the breach complained of, not only as to one, but as to all of the houses. The lessee

should be reminded of all his obligations, or he may be put to great doubt and unnecessary inconvenience. It would be an abuse of a landlord's rights to serve five notices at different dates in respect of five houses covered by the same lease and forming one property. If the landlord takes proceedings for possession, and the lessee applies for relief, it is desirable, and most convenient, that the Court should have before it a notice of the breaches which will comprise all dilapidations": *Hurd v. Whaley* [1918] 1 K. B. 448; 88 L. J. (K.B.) 260.

The statute requires that, "before the landlord asserts the forfeiture, he shall have given notice, not of his intention to forfeit, as is argued, but of his desire to have the covenant lived up to, drawing attention to the particular thing which the tenant has done or has left undone. The notice does not need to be an election, but is to serve as a warning to the tenant so as to prevent him being taken by surprise": per Middleton, J., following *Penton v. Barnett* [1898] 1 Q. B. 276, in *Holman v. Knox* (1912) 25 O. L. R. 588 [Div. Ct.] at p. 629; 21 O. W. R. 325, and see the remarks of Clute, J., to the same effect, at p. 620, where he discusses the meaning of the words "particular breach."

See also *Isman v. Widen* [1920] 3 W. R. R. 766 [Sask. C.A.].

The fact that the notice does not claim a certain sum for damages does not make it bad: *Holman v. Knox* (*supra*), per Clute, J., at p. 622.

Where the breach complained of is a continuing one—as the breach of the covenant to repair—notice of the breach does not preclude the landlord from acting on the subsequent breaches and a new notice is not required: *Holman v. Knox* (*supra*).

A notice sufficient under the statute given by one trustee is not objectionable where it is adopted by all: *Holman v. Knox* (*supra*).

A notice specifying the particular breaches complained of is not vitiated by the addition of a general clause at the end to the effect that the completion of

the items mentioned in it did not excuse the execution of other repairs if found necessary: *Fox v. Jolly* [1916] 1 A. C. 1; 36 C. L. T. 223.

In *Walters v. Wylie* (1912) 3 O. W. N. 177; 20 O. W. R. 312 [Britton, J.]; 32 C. L. T. 321; 3 O. W. N. 567; 20 O. W. R. 994 [Div. Ct.]; it was held there had been no breach of a covenant not to bring intoxicating liquors on the premises for the purposes of sale. The Divisional Court held that the notice given was not a proper notice under c. 170, s. 18 [s. 20 (2)]. Middleton, J., said, p. 568: "This provision is general and applies to both positive and negative covenants: *Harman v. Ainslie* [1904] 1 K. B. 698. . . . This is not the case of an application for relief from forfeiture under s. 20 (3), where the landlord's right has become enforceable because an adequate notice has been given and the tenant has failed to comply—even then upon proper terms the Court might and probably would relieve: *Rose v. Spicer* [1911] 2 K. B. 234."

A very little inaccuracy in a notice that is to be made the basis of a forfeiture, such as erroneously stating the date of a lease, is sufficient to invalidate the notice: *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687; *Jackson v. Northampton Street Tramways* (1887) 55 L. T. 91; *Great Western Lumber Co. v. Wilkins* (1908) 1 Alta. L. R. 155, applied; *Big Valley Collieries Ltd. v. McKinnon* (1915), 32 W. L. R. 158; 9 W. W. R. 4; 23 D. L. R. 62 [Alta.—Hyndman, J.]; 35 C. L. T. 846.

The same principle is laid down in *Paulson v. The King; The King ex rel. A.-G.* [Can.] v. *Paulson* (1915) 9 W. W. R. 1099; 52 S. C. R. 317 [S. C. Can.—Alta.]; [1920] 3 W. W. R. 72 [P.C.].

*Humberstone v. Belmont Coal Co.* (1910) 13 W. L. R. 119 [Alberta—Full Ct.]. The lessor who had leased to the B. Co. served notice of cancellation for breach of covenant addressed to the K. Co., on T., who was doing the mining. It was held that there had been no breach by the B. Co., and that the lessor might not be allowed to turn his action into one of ejectment against T.



*The Service of the Notice.*

In Saskatchewan by 9 Geo. V. c. 79, ss. 27 and 28, service of the notice is provided for and formal defects cured. These provisions are identical with ss. 36 (1) and (2) and 37 of the Ontario Act set out at p. 453 (*ante*), which, however, do not appear to apply to notices under s. 20 (2).

The Ontario Act applies them to the services under s. 28 of the Ontario Act which was not copied into the Saskatchewan Act. See p. 453 (*ante*).

*The Compensation.*

The compensation for breach of covenant which a lessee is liable to pay under the Act, does not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by that section: *Skinner's Co. v. Knight* [1891] 2 Q. B. 542 [C.A.]; approved in *Lock v. Pearce* [1893] 2 Ch. 271.

But where in an action for re-entry upon breach of covenant to repair, the defendant applies for relief under sub-section 2 of s. 11 of the [Imp.] Act, the Court may in its discretion make an order to stay the action upon payment by the defendant of the plaintiff's costs as between solicitor and client as well as the cost of surveys and schedules of dilapidations: *Bridge v. Quick* [1892] 61 L. J. (Q.B.) 375; 67 L. T. 54.

## WAIVER OF FORFEITURE.

ARTICLE 116.—Forfeiture may be waived by a landlord doing any act inconsistent with an intention to enforce his right — after that right has, to the knowledge of the landlord, accrued to him.

[Authorities: *Cornish v. Boles* (1914) 31 O. L. R. 505; *Fitzgerald v. Barbour* (1908) 17 O. L. R. 254 [C.A.]; *Nelles v. McNee* (1906) 7 O. W. R. 158; *Miniuk v. White* (1905) 1 W. L. R. 401 (Man.); *Pigeon v. Preston* (1912) 3 W. W. R. 695 [Sask.].

If a lessor or other person legally entitled to the reversion knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at any later period, he thereby waives such forfeiture: *Cole Ejec.* 408.

There is a distinction between waiver of a forfeiture and waiver of a notice to quit, because the former may be waived by the lessor only, whereas the latter cannot be waived without the consent of both parties: *Blyth v. Dennett* (1853) 13 C. B. 178.

The question of waiver is discussed by Mr. J. S. Ewart, K.C., in an article in (1905) 25 C. L. T. 247, at pp. 253 and 256.

“There has never been any doubt that a forfeiture does not act *ipso facto*, but can be waived, and that an unequivocal act which shows a claim by the landlord of the existence of a tenancy, after the act complained of, operates as such a waiver—at least if such act be done before an unequivocal claim of forfeiture. It is needless to cite authority for this elementary proposition: *McMullen v. Vannatto* (1894), 24 O. R. 625, is a case in our own Courts. Action brought for rent accruing due after the noxious acts is such an unequivocal act, operating as a waiver. This is equally elementary: *Dendy v. Nicholl* (1858) 4 C. B. N. S. 376, has never been questioned, but has been consistently followed: *Penton v. Barnett* [1898] 1 Q. B. 276,” per Riddell, J., in *Straus Land Corporation Ltd. v. International Hotel, Windsor, Ltd.* (1919) 45 O. L. R. 145, at p. 149; 15 O. W. N. 411; 49 D. L. R. 519 [App. Div.].

#### *The Necessity for Knowledge on the Part of the Landlord.*

There can be no waiver without knowledge on the part of the landlord of the existence of his right to forfeit: *Fitzgerald v. Barbour* (1908) 17 O. L. R. 254 [C.A.]; *Holman v. Knox* (1911) 25 O. L. R. 588 [Div. Ct.]; per Sutherland, J., at p. 604; *Dominion Coal Co. v. McLeod*

(1909) 7 E. L. R. 20; 29 C. L. T. 1088; *Dominion Coal Co. v. Taylor* (1909) 7 E. L. R. 199.

*The Acceptance of Rent as Waiver.*

The receipt, after the right of forfeiture accrues, of rent due before is not a waiver, even though such rent was payable in advance for a term not expired at the time the right to forfeit arose.

Receipt of rent subsequent to the breach is: *Doe d. Gatehouse v. Rees* (1838) 4 Bing. N. C. 384 (a case of assignment without leave), as were *Doe d. Griffith v. Pritchard* (1833) 5 B. & Ad. 765; *Croft v. Lumley* (1855) 5 E. & B. 648, (1858) 6 H. L. C. 672; *Davenport v. The Queen* (1877) 3 A. C. 115; *Cornish v. Boles* (1914) 31 O. L. R. 505 [App. Div.]; *Rex v. Paulson* [1920] 3 W. W. R. 372; 52 S. C. R. 317; 9 W. W. R. 1099; 15 Exch. Ct. R. 292; *Isman v. Widen* [1920] 3 W. W. R. 766 [Sask.—C.A.]; *Hartell v. Blackler* [1920] 2 K. B. 161; 89 L. J. (K.B.) 838.

In *Nelles v. McNee* (1906) 7 O. W. R. 158, the Court held that the receipt of rent and verbal assent to assignment worked a waiver—following *Walrond v. Hawkins* (1875) L. R. 10 C. P. 342, recognized as an authoritative case by *Laurie v. Lees* (1881) 14 Ch. D. 249, 7 A. C. 19; 30.

*Miniuk v. White* (1905) 1 W. L. R. 401 [Man.], is to the same effect, and see also *Pigeon v. Preston* (1912) 22 W. L. R. 894; 6 D. L. R. 399; 3 W. W. R. 694 [Sask.]; *Le Corporation Episcopale Catholique Romane de St. Albert v. R. J. Sheppard & Co. Ltd.* (1913) 3 W. W. R. 814 [Alta.—Scott, J.] a case of acceptance of rent without any verbal assent.

The tenant has not the option of depriving the landlord of this right [to re-enter] by some act on his part, as for example, by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit: *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 466. Per Mulock, C.J.Ex., at p. 473; *Ping Lee v. Crawford* (1919) 17 O. W. N. 20 [Logie, J.].

Where rent is received without prejudice there is no waiver: *Holman v. Knox* (1911) 25 O. L. R. 588 (Div. Ct.). But in *Strong v. Stringer* (1889) 61 L. T. 470; 5 T. L. R. 638, it was held there was a waiver where rent was demanded without qualification and paid, although a receipt was given "without prejudice." And see *Peter-son v. R.* (1889) 2 Ex. Ct. 67.

Where there is a breach of a covenant to repair, and the lessor enters therefor, his acceptance of rent which accrued due after the forfeiture will not be a waiver, for there can be no waiver after entry: *Thompson v. Baskerville* (1879) 40 U. C. R. 614.

But if after the bringing of an ejectment for a forfeiture the lessor accept rent or distrain or set up as a cause of forfeiture a subsequent non-payment of rent, it is no waiver: *Doe v. Meux* (1825) 4 B. & C. 606; 1 C. & P. 346; *Jones v. Carter* (1846) 15 M. & W. 718; *Grimwood v. Moss* (1872) L. R. 7 C. P. 360; 41 L. J. (C.P.) 239.

In *Booth v. Callow* (1913) 23 W. L. R. 616 [B.C.—Gregory, J.], affirmed (1914) 24 W. L. R. 813; 4 W. W. R. 73; 11 D. L. R. 124 [C.A.]; it was held there was a waiver of forfeiture for non-payment of taxes, the landlord having accepted rent up to within a few days before the commencement of the action; the lease was also rectified on the ground of mistake.

In *Soper v. Littlejohn*, after the forfeiture discussed at p. 711, *ante*, the assignee went into possession and the lessors accepted part of the accelerated rent as a compromise. They also accepted compensation for use and occupation from a sub-lessee. It was held they had not waived the forfeiture—nor did they waive it by authorizing the assignee to pay certain sums to the mortgagee of the premises.

In *Grossman v. Modern Theatres Limited* (1919) 45 O. L. R. 564; 16 O. W. N. 242 [Rose, J.] followed *Fitzgerald v. Barbour* (*ante* p. 742), and held that where a landlord knew that his tenant had at least "set-over" the premises in breach of a Short Forms covenant against assigning [see p. 1109, *post*], but demanded and subsequently received rent, he had waived the forfeiture—

even while stating he would not assent to the "setting-over."

Where breaches of covenant occur contemporaneously with the close of the term, and the rent had all accrued before the breach, and the lessee paid after going out of possession, it was an ordinary debt and acceptance of the rent was held not to be a waiver of a claim for damages for the breach: *Nelles v. McNee* (*supra*) considered: *Wilson v. McLean* (1906) 7 O. W. R. 540; 26 C. L. T. 347 [Clute, J.].

See also *Goggin v. Whittaker* (1908) 38 N. B. R. 415.

A tenant gave a note for rent due under a lease up to the 1st December, 1856. He afterwards obtained a note made by the landlord for £28 15s., and being unable to pay his taxes, gave it to the bailiff before it fell due, telling him to ask the landlord to advance the sum required and to credit the balance (the note exceeding the taxes) on the then current rent. The landlord's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing, saying he would apply it on a previous note given by the lessee which remained unpaid, and this was held no acceptance of rent due after December, 1856, so as to waive the forfeiture: *McDonald v. Peck* (1859) 17 U. C. R. 270.

A landlord gave a notice under the Conveyancing Act to repair within three months and subsequently accepted rent. It was held that although he had thereby waived the forfeiture down to the date the rent accrued due, he had not waived the forfeiture for non-repair after that date; that the breach was a continuing one and no new notice was necessary. The fact that the tenant had made a few of the repairs specified did not make the notice any less applicable to the repairs not done: *New River Company v. Crumpton* [1917] 1 K. B. 762; 86 L. J. (K.B.) 614; 37 C. L. T. 465 [Rowlatt, J.].

A lease contained a proviso for re-entry if (a) the lessee became bankrupt; (b) the rent were in arrears for twenty-one days. In July, 1918, the lessee became bankrupt. In January, 1919, two quarters' rent were in arrear. On the 21st January, 1919, an action was

brought for possession and the rent in arrear. The defendant paid the sum in arrear and costs under the Common Law Procedure Act of 1852 [see p. 760, *post*] and this put an end to the action. In May, 1919, an action was commenced for possession claiming forfeiture under the bankruptcy. Coleridge, J., held that the acceptance of the rent, under the statute, was not a waiver of the other forfeiture by reason of the bankruptcy, nor even of the forfeiture for non-payment of rent. He accepted the *dicta* in *Tollman v. Portbury* (1872) L. R. 7 Q. B. 344, in this latter finding. He explained *Dendy v. Nicholl* (p. 742), and held that an action for possession alone owing to forfeiture is an irrevocable act and that nothing done subsequently could be construed into an acknowledgment of the tenancy: *Evans v. Enefer* (1920) 36 T. L. R. 441; 40 C. L. T. 615; 89 L. J. (K.B.) 845.

Where a lease containing an option to the lessee to purchase the property during the term has been forfeited for non-payment of rent, and it appears that certain representations as to improvements to be made on the property (which were not, in fact, made) materially influenced the lessor in granting the lease, the mere fact of the lessor having accepted rent due under the lease will not prejudice his right to rely on the lessee's failure to carry out his representations as an answer to a suit by the latter to enforce specific performance of the agreement to purchase after the forfeiture of the lease, though such rent is accepted after the time at which the improvements were to be made: *Coventry v. McLean*, 21 A. R. 176; (1894) 22 O. R. 1.

Where a lease contains a clause of forfeiture on the lessee making an assignment for the benefit of creditors, and such assignment is made, the receipt after the forfeiture of rent which has become due before will not amount to a waiver of the landlord's right nor afford evidence of the creation of a new tenancy: *Dobson v. Sootheran* (1888) 15 O. R. 15.

Though an acceptance of rent after a breach of covenant by the lessee, where the lease contains a provision making such breach work a forfeiture of the term, or

gives to the lessor a right of re-entry, is a waiver of the forfeiture, yet where the breach is continuing, that is, renewed immediately after the last acceptance of rent, a different rule or an exception to the rule is created: *Leighton v. Medley* (1882) 1 O. R. 207.

Acceptance of rent to a certain day will not prevent an action being brought on the day following, for the breaches are continuing. Breaches of covenant in a farm lease to keep fences in repair and to keep eighteen acres in meadow during the term, are continuing breaches and the right to re-enter for them is not waived by acceptance of rent: *Ainley v. Balsden* (1857) 14 U. C. R. 535. The occupation of an assignee or sub-lessee in violation of a covenant in the lease against assigning or sub-letting, does not constitute a continuing breach of covenant, and the occupation for the whole term for which such person is put in possession may be waived by acceptance of rent: *Walrond v. Hawkins* (1875) L. R. 10 C. P. 342.

Where a lease contains a covenant against assigning without leave, and the lessee mortgages the term without license, the waiver of the forfeiture in relation to the mortgage will not affect the lessor's right to take advantage of any subsequent breach: *Bacon v. Campbell* (1879) 40 U. C. R. 517.

### *Distress as a Waiver.*

Giving a notice to quit and distraining for rent is a waiver: *Pigeon v. Preston* (1912) 3 W. W. R. 694; a case of breach of covenant not to assign without leave.

And see *Whittaker v. Goggin* [p. 359, *ante*].

It is well settled that a forfeiture is waived by distress: *Cotesworth v. Spokes* (1861) 10 C. B. N. S. 103; 30 L. J. (C.P.) 220; *Walrond v. Hawkins* (1875) L. R. 10 C. P. 342. And the distress waives any forfeiture not only up to the day on which the rent distrained for was due but up to the day of the distress itself: see *Ward v. Day* (1863) 4 B. & S. 337; 5 Id. 359; 33 L. J. (Q.B.) 11; *Doe v. Peck* (1830) 1 B. & Ad. 428; *Shepherd v. Berger* [1891] 1 Q. B. 597.

As a distress waives a forfeiture for non-payment of rent prior to the distress, where a lessor sued for possession by reason of an alleged forfeiture for non-payment of rent and also for arrears of rent not realized on a prior distress, the action for possession was dismissed and the action for rent sustained: *Kirkland v. Briancourt* (1890) 6 T. L. R. 441; see also *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337; *Baker v. Atkinson* (1886) 11 O. R. 735; (1888) 14 A. R. 409.

Since the 8 Anne, c. 14, allowed a distress to be made after the end of the term, it has been held that a distress is not an admission of a tenancy: *Doe v. Bullen* (1848) 5 U. C. R. 369; and a distress is not an election to forfeit, though made after a cause of forfeiture has occurred: *Linton v. Imperial Hotel Co.* (1889) 16 A. R. 337.

If the landlord, after commencing an action of ejectment for a forfeiture, distrain and receive rent subsequently accruing, that will not *per se* set up the former tenancy, which ended on the issue of the writ; but it may be evidence of a new tenancy on the same terms from year to year: *McMullen v. Vannato* (1893) 24 O. R. 625.

In *Fenny v. Casson* (1908) 12 O. W. R. 404 [Clute, J.]; 722 [Div. Ct.], where rent for January was tendered and refused, the lessee was not thereby excused from tendering the rent for February and March. After action brought for possession on the ground that the lease was forfeited for non-payment of rent, the landlord distrained for rent. It was held that the conduct of the landlord and his pleadings in the action showed clearly that he intended to treat the tenancy as subsisting and his action was dismissed.

### *Notice to Quit as a Waiver.*

An unqualified demand of rent would appear to waive a forfeiture: *Doe v. Birch* (1836) 1 M. & W. 402-8; *Dendy v. Nicholl* (1858) 4 C. B. N. S. 376, and see *Evans v. Enefer*, noted at p. 746, *ante*. When rent is demanded without qualification and paid, the giving of a receipt "without prejudice" will not prevent the payment from



waiving a forfeiture: *Strong v. Stringer* (1889) 61 L. T. 470; 5 T. L. R. 638; see also *Peterson v. The Queen* (1889) 2 Ex. Ct. 67.

Where, on the 30th December, notice was given forthwith determining a tenancy in relation to telephone wires, and at the same time the lessor demanded and received rent up to the 31st December, it was held that "forthwith" meant now, and the tenancy was therefore determined on the day the notice was given, but that the receipt of rent for the day beyond operated as a waiver of the notice: *Keith v. National Telephone Co.* [1894] 2 Ch. 147; *Davenport v. The Queen* (1887) 3 A. C. 115.

See also *Pigeon v. Preston* (*supra*).

### *Other Acts of Waiver.*

Where a breach is committed before the lease is executed by the lessee, and the landlord is aware of the fact and permits the lessee to execute the lease without any objection, he will be held to have waived any right to object afterwards: *Holman v. Knox* (1912) 25 O. L. R. 588; 21 O. W. R. 325; 3 O. W. N. 745, 3 D. L. R. 207 [Div. Ct.], followed; *Just v. Stewart* (1913) 4 W. W. R. 780, 24 W. L. R. 433 [Man.—Curran, J.], and see *Millard v. Humphries* (1918) 62 S. J. 505.

Where a writ in an action for possession claims rent accruing after the cause of forfeiture, even though the claim is omitted from the statement of claim, there is a waiver of the forfeiture: *Bevan v. Barnett* (1897) 13 T. L. R. 310; 17 C. L. T. 124 [Wright, J.].

Then *Penton v. Barnett* [1898] 1 Q. B. 276 [C.A.], purported to distinguish *Bevan v. Barnett* on the same facts. *Penton v. Barnett* (*supra*) is aptly criticised in (1898) 18 C. L. T. 91, by E. D. Armour, K.C.

Under the circumstances detailed at p. 636, *ante*, the landlords in *Straus Land Corporation, Limited v. International Hotel Windsor, Limited* (1919) 45 O. L. R. 145; 15 O. W. N. 411; 49 D. L. R. 519 [App. Div.], claimed against their tenants: (1) forfeiture of the lease for breach of the covenant to repair and for sub-letting without leave in breach of another covenant; (2) all arrears of

rent; (3) damages for the said breaches of the covenant to repair; (4) *mesne profits*; (5) further and other relief. The rent claimed accrued after all the acts upon which the right of forfeiture was based had been committed. It was held (Rose, J., dissenting), that the acts alleged as justifying forfeiture not being continuing acts, the plaintiffs, by claiming both rent and forfeiture in the same action, had waived the forfeiture. There was no act unequivocally shewing that the landlords insisted upon the forfeiture until the action was begun by the issue of a writ. The abandonment at the trial or later of the claim for rent could not reinstate the forfeiture: *Bevan v. Barnett* (*supra*), approved and followed.

Riddell, J., said [at p. 149]: "Whether, when in the same action for rent forfeiture is also claimed, the action will operate as a waiver, has been doubted. But *Bevan v. Barnett* (*supra*), decides in the affirmative. This case has been distinguished (*e.g.*, in *Penton v. Barnett*, *ut supra*), but not questioned, much less overruled; it recommends itself on principle and should be followed. At the least such a proceeding is evidence of a waiver, and we should in the present case hold it a waiver." But see per Rose, J., dissenting. The plaintiffs, upon their appeal from the judgment at the trial, which dismissed the action, abandoned their claim for rent, and were held in strictness to be barred of the right to recover it; nevertheless, in order to do justice, the Court offered to put them in the same position as if they had appealed as to rent, and to give them judgment for the gales which had accrued before the commencement of the action, which had been paid into Court: and see the provisions as to costs.

In *Brown v. Gallagher*, noted at length at p. 719, *ante*, Middleton, J., held that the assignor of the reversion had waived a forfeiture for non-payment of rent accruing due before the assignment.

*Mere Knowledge of Breach or Acquiescence is not  
Waiver.*

There must be some positive act of waiver, such as receipt of rent or the doing of some act inconsistent with

the idea that the landlord considers the tenancy at an end: *McLaren v. Kerr* (1878) 39 U. C. R. 507.

If however the landlord stands by, knowing of the breach and knowingly permits the tenant to expend money on improvements, which he would lose in the event of forfeiture, there will be a waiver.

An election not to re-enter is not a waiver of a forfeiture: *Balagno v. LeRoy* (1913) 23 W. L. R. 621; 3 W. R. 1124; 10 D. L. R. 601; 18 B. C. R. 127 [Gregory, J.].

### *The Statutes.*

The Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, provides by s. 26, that "where an actual waiver of the benefit of a covenant or condition in a lease, on the part of a lessor or his heirs, executors, administrators, or assigns, is proved to have taken place in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates nor to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect appears."

This section is taken from the 23-24 Vic. c. 38, s. 6 [Imp.].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (14) [Laws Declaratory Act].

New Brunswick: C. S. N. B. 1903, c. 153, s. 8.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 16.

In *Balagno v. Leroy* (1913) 23 W. L. R. 621, 3 W. W. R. 1124, 10 D. L. R. 601, 18 B. C. R. 127 (Gregory, J.), this section was discussed, and the argument that taking no steps to re-enter when rent was not paid—as happened frequently prior to the rent in question becoming in arrear—was a waiver within the meaning of the Act, was not given effect to.

### *Licenses to do Forbidden Acts.*

Apart from statute a license to assign or under-let operates as a total waiver of the condition against assign-

ing or under-letting, such condition being considered as an entire thing, not capable of being waived or released as to part only.

This is the Rule in *Dumpor's Case* (1603) 4 Co. Rep. 119 (b), in which it was held that a license once given put an end to the right of entry for any subsequent assignment without license.

The rule was discussed by Beck, J., in *Royal Trust Co. v. Bell* (1909) 12 W. L. R. 546 [Alta.], where he said: "It may be that the rule laid down in *Dumpor's Case* (*supra*), the effect of which has been done away with by statute in England and Ontario, but not in this province, namely, that, once a license to assign has been given, the condition of forfeiture in default of a license is exhausted, is effective equally in a case of the condition of forfeiture for alterations made without leave, and that, therefore, a license for alterations having been given by the lessor in one instance, the condition was gone. It is clear to me that the alterations complained of are not only no detriment but an improvement to the property. Having some doubt as to the validity of the answers above indicated to the plaintiff's claim of forfeiture for breach of the covenant now under consideration, I think I should, in view of my having already decided to relieve from forfeiture incurred on another ground, treat this also as a case of forfeiture to be relieved from, and I accordingly do so."

The Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, provides by s. 24, that "where a license to do any act which without such license would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease is given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but shall not prevent a proceeding for any subsequent breach unless otherwise specified in such license; and all rights under covenants and powers of forfeiture and re-entry in the lease

contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease or other matter not specifically authorized or made punishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done."

This section was taken from the 22-23 Vic. c. 35, s. 1 (Imp.).

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (18).

New Brunswick: C. S. N. B. 1903, c. 153, s. 6.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 14.

Upon a lease made pursuant to the Short Forms Act, containing a condition for re-entry on assigning or sub-letting without leave, when the lessor gives a license to assign part of the demised premises he may re-enter on the remainder for breach of covenant not to assign or sub-let, notwithstanding that the proviso for re-entry requires the right to be exercised in respect of the whole or a part in the name of the whole. Section 24 is to be read with s. 25, the former referring generally to all cases, and making licenses to alien applicable *pro hac vice* only: the latter referring to specific cases of licensing the alienation of a part and reserving the right of re-entry as to the remainder. Hence where a lessor gave a license to alien part of the demised premises, it was held that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave he might re-enter: *Baldwin v. Wanzer* (1892) 22 O. R. 612.

By section 25, "where in a lease there is a power or condition of re-entry on assigning or under-letting or doing any other specified act without license, and a license has been or is given to one of several lessees or co-owners to assign or under-let his share or interest or

to do any other act prohibited to be done without license, or has been or is given to a lessee or owner or any one of several lessees or owners to assign or under-let part only of the property, or to do any other such act in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license."

This provision was taken from the 22-23 Vic. c. 35, s. 2 [Imp.].

*Similar Legislation.*

New Brunswick. C. S. N. B. 1903, c. 113, s. 7.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 15.

RELIEF AGAINST FORFEITURE.

ARTICLE 117. — The Courts of some provinces have statutory rights to relieve against certain forfeitures, and in all provinces they grant equitable relief in cases where compensation can be made. In some provinces the power to grant equitable relief is limited by statute.

The right to elect to determine the lease created by the contract in the lease is a legal one; and unless relieved against or defeated by some act such as release, abandonment or waiver, may be exercised until barred by the Statute of Limitations: *Matthews v. Smallwood* [1910] 1 Ch. 777, 786, followed in *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466 [App. Div.].

Prior to the passing of the statutes noted below, it was settled law that no relief could be given against for-

feiture of a lease except under circumstances of fraud, accident or mistake: *Bamford v. Creasy* (1862) 3 Giff. 675.

The Court of Chancery shewed a disposition to grant relief in cases where compensation could be made, as in *Sanders v. Pope* (1806) 12 Ves. 282, but the right was not finally admitted and equitable relief was confined to cases of forfeiture for non-payment of rent: *Bracebridge v. Buckley* (1816) 2 Price 200; *Bowser v. Colby* (1841) 1 Hare, 109, 134.

A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds, and where the trial of the action for relief takes place after the term has expired by effluxion of time, relief will not be given to enable the lessee to exercise an option to purchase which he could only exercise during the term: *Coventry v. McLean* (1894) 21 A. R. 176 [C.A.]; (1893) 22 O. R. 1 [Div. Ct.].

Though a Court of Equity will not in general relieve against a forfeiture for breach of a covenant to repair, it will do so where the lessor has by his conduct misled the lessee into supposing that the covenant would not be insisted on. Thus where after notice to repair within six months, negotiations for the purchase of the lessee's interest commenced and were not terminated until eight days before the time for repair would expire, it was held that the lessees repairing after the time specified in the notice were protected from forfeiture: *Hughes v. Metropolitan Ry. Co.*, (1877.) 1 C. P. D. 120; 2 A. C. 439; 46 L. J. (Q.B.) 583.

Since the Judicature Act the Court will dispose of questions in their equitable rather than their legal aspect, in all cases where under the former practice the Court of Chancery would have relieved against the forfeiture.

A breach of covenant for non-payment of taxes remedied by payment before statement of claim filed, is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a

mere money payment: *Buckley v. Beigle* (1885) 8 O. R. 85.

Where a covenant accompanied by a right of re-entry on breach is so expressed that its meaning is doubtful and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced, for the difficulty of construing the covenant is a special circumstance entitling him to relief: *McLaren v. Kerr* (1878) 39 U. C. R. 507.

This case was followed in *Just v. Stewart* (1913) 34 W. L. R. 433; 4 W. W. R. 780 [Man.—Curran, J.].

The Court will not decide as to the meaning of an insensible condition or proviso for re-entry: *Doe d. Wyndham v. Carew* (1841) 2 Q. B. 317; *Doe d. Spencer v. Goodwin* (1815) 4 M. & S. 265, followed in *Fetherstone v. Bice* [1917] 1 W. W. R. 224 [Alta.—Walsh, J.]; *Just v. Stewart* (*supra*).

The Courts will not—apart from statute—except very rarely—relieve against forfeiture for breach of a covenant to insure: *Green v. Bridges* (1830) 4 Sim. 96; or of a covenant not to assign or sub-let: *Barrow v. Isaacs* [1891] 1 Q. B. 417, 60 L. J. (Q.B.) 179. These latter covenants are further considered, from this aspect, at p. 759, *post*.

In *Warner v. Linahan* [noted at p. 765, *post*], Harvey, C.J., said:

“The Courts’ interference for such a purpose is founded on well-established principles and they do not in my opinion extend to such a case as this. In Snell’s Equity (17th ed.), p. 345, it is stated that ‘The principle which governs the Court in relieving against forfeitures is that the Court will only relieve against a forfeiture where the Court could give compensation for the forfeiture, and equity in general therefore only relieved against a forfeiture where the forfeiture in substance was merely security for payment of a monetary sum.’

And on the following page:

‘On similar principles, forfeitures under express limitation are, in general, not relievable. A common illustration is the forfeiture which arises under the proviso



for re-entry contained in a lease. Here, as a rule, no relief was obtainable, and the legal forfeiture took effect. But here, again, if the forfeiture rose by reason of non-payment of rent, then equity relieved.'

Likewise Indermaur & Thwaites' Equity (7th ed.), p. 437:

'Although the Court gave relief against a forfeiture for non-payment of rent, yet it would not do so in respect of other covenants, *e.g.*, a covenant to repair, or to insure, or not to assign without license; and a tenant committing breaches of such covenants was, therefore, absolutely liable to be ejected under the condition of re-entry reserved in the lease.'

Smith's Equity (5th ed.) is to the same effect when at p. 258 it is said:

'It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that when there are no means of ascertaining what amount of compensation would be equitable, no relief will be given.

'Thus in the case of a breach of a general covenant to repair, by which a forfeiture has been incurred, equity has hitherto usually refused to interfere. The case of a covenant not in general terms, but to lay out a specific sum in a given time, was sometimes distinguished; but it seems that even in such cases relief was only given under special circumstances. On similar grounds relief was refused in case of a breach of a covenant to build houses; and of a covenant to cultivate land in a husband-like manner.'

The ground for the exercise of the Court's jurisdiction is of course to do equity, but to say that this defendant may go on under the lease notwithstanding that he has broken its terms to the damage of the plaintiff for which he has not and cannot give adequate compensation would appear to me to be far from equitable."

And see *Brown v. Gallagher* [noted at p. 719, *ante*], where the principles are discussed, and *Litvinoff v. Kent* (1918) 34 T. L. R. 298.

The tenant cannot obtain equitable relief in summary proceedings under the Ontario Landlord and Ten-

ant Act [see p. 926, *post*]; he must seek it by bringing an independent action or by an application to the Court in the lessor's action to enforce his right of re-entry: *Lock v. Pearce* [1893] 2 Ch. 271, followed: *Re Bagshaw & O'Connor* (*ante*, p. 754). But see *Ryan v. Turner* [p. 930, *post*].

*Ping Lee v. Crawford* (1919) 17 O. W. N. 20 [Logie, J.]. On the 28th July, 1915, the defendant leased to Tom H. Lee certain premises for five years from the 1st September, 1915.

Neither the lessor nor any one on her behalf had any dealings with the plaintiff or knew him in either of these transactions, nor subsequently till the 16th July, 1919. The plaintiff was not a party to the leases, nor were they expressed to be on behalf of a partnership.

By a judgment in an action of Ping Lee against Tom Lee, dated the 11th April, 1919, the Court declared that the plaintiff was a partner of the defendant and entitled to a partnership interest in the business of restaurant-keepers carried on in the premises, and that he had been such since the 15th July, 1915, and declared the partnership dissolved with a reference to the Master in Ordinary to take the accounts. No specific mention was made in the judgment of the leases above referred to.

On the 11th of July the defendant gave notice of forfeiture to Tom H. Lee.

The first intimation that the present plaintiff claimed any interest in the premises was a tender of the overdue rent on his behalf to the defendants on or about the 16th July, 1919.

The defendant Agnes Crawford disclaimed all knowledge of the plaintiff, and proceeded under her notice to take possession until restrained by the injunction. On a motion to continue the injunction two objections were raised by the defendants, either of which was held to be fatal to the continuance.

(1) There was no privity between the plaintiff and the defendant. See *Alder v. Fouracre* (1818) 3 Swanst. 489.

(2) The defendant was not a party to the action of *Lee v. Lee*; and, if the plaintiff had any rights under the leases, they must be determined in this action.

Logie, J., held that the only right which the plaintiff could claim against the defendant was relief against forfeiture of the leases, and as the action was at present constituted, he had no standing.

The original lessee (except under extraordinary circumstances) must be a party—and relief should not be given in his absence. *Hare v. Elms* [1893] 1 Q. B. 604, followed.

The original lessee was not a party to this action, and on this ground also the extraordinary remedy by injunction should be withheld till the questions in issue had been tested at the trial.

The plaintiff's counsel stated that he was in no sense an under-lessee, so that relief could not be afforded him under s. 21 of the Landlord and Tenant Act, R. S. O. 1914, c. 155 (see p. 768).

### *The Statutory Provisions.*

#### *Covenants to Insure.*

Under the former Ontario Judicature Act, R. S. O. 1897, c. 51, s. 30, the High Court was given power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire where no loss or damage had happened and the breach had in the opinion of the Court been committed through accident or mistake or otherwise, without fraud or gross negligence and there was an insurance on foot at the time of the application of the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

This statute was copied from Lord St. Leonard's Act (1859) 22 & 23 Vic. c. 35. When the Judicature Act of 1913, now R. S. O. 1914, c. 56, s. 19, was passed this provision was omitted; and only the provisions discussed at p. 764, *post*, retained as s. 19.

The case of a forfeiture for breach of a covenant to insure is now dealt with by the provisions of the Landlord and Tenant's Act referred to at p. 761, *post*; and by s. 20 (10) added in 1913 by 3-4 Geo. V. c. 18, s. 30, which provided that in such cases relief shall not be granted "if at the time of the application for relief there is not an insurance on foot in conformity with the covenant or condition to insure except, in addition to any other terms which the Court may impose, upon the term that the insurance is effected."

This section was not copied into the Saskatchewan Act of 1919 which refers to the King's Bench Act of 1915, c. 10, s. 18, noted (*infra*).

### *Similar Legislation.*

Alberta: (1919) 9 Geo. V. c. 3, ss. 17, 18, 19.

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (15) (16), (17).

Manitoba: R. S. M. 1913, c. 46, s. 14 [King's Bench Act], corresponds to R. S. O. 1897, c. 51, s. 30.

New Brunswick: C. S. N. B. 1903, c. 152, ss. 26 to 29.

Saskatchewan: (1915) 9 Geo. V. c. 10, ss. 18 and 19 [King's Bench Act], corresponds to R. S. O. 1897, c. 51, s. 30.

### *Non-payment of Rent.*

The Common Law Procedure Act of 1852, 15 & 16 Vic. c. 76, ss. 210, 211 and 212 [Imp.] contained the "negative" provisions for relief against forfeiture for non-payment of rent discussed in the Encyclopædia of the Laws of England, vol. vii., pp. 711 and 716.

These provisions were not affected by the English Conveyancing Act of 1881 referred to below, but the Ontario Act of 1911 has added to the provisions copied from the Conveyancing Act an enactment dealing with such a forfeiture.

It provides that "where the action is brought to enforce a right of re-entry or forfeiture for non-payment of rent, and the lessee at any time before judg-

ment, pays into Court all the rent in arrear and the costs of the action, the proceedings in the action shall be forever stayed"; R. S. O. 1914, c. 155, s. 20 (6), and this provision was copied into the Saskatchewan Act (1919) 9 Geo. V. c. 79, s. 10 (5).

### *Relief Generally.*

By the Ontario Landlord and Tenants Act, R. S. O. 1914, c. 155, s. 20 (3), "where a lessor is proceeding by action or otherwise to enforce any right of re-entry or forfeiture [whether for non-payment of rent or for other cause], the lessee may, in the lessor's action, if any, or [if there is no such action pending then] in an action brought by himself, apply to the Court for relief; and the Court may grant such relief as, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, the Court thinks fit; and on such terms as to payment of [rent] , costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court may deem just."

This section is copied from the [Imperial] Conveyancing and Law of Property Act of 1881, 44-45 Vic. c. 41, s. 14, ss. (2), the words in brackets being added in 1911 by 1 Geo. V. c. 37, s. 20 [Ont.]. They formerly appeared in the R. S. O. 1897, c. 171, s. (7).

The provision was copied in Saskatchewan in (1919), 9 Geo. V. c. 79, s. 10 (3).

This section should be read in conjunction with s. 20 (2) of the same Act. The same provisions affect this section as are applicable to s. 20 (2). They are considered at pp. 733 and 734 (*ante*).

In *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466 [App. Div.] it was held that relief under this section could not be given in summary proceedings under Part III. This case is discussed at p. 930, *post*.

By s. 20 (7) of the Ontario Act [s. 10 (6) of the Saskatchewan Act], "where relief is granted under the

provisions of this Act, the lessee shall hold and enjoy the demised premises according to the lease thereof made without any new lease."

*Covenant Against Assigning Without Leave.*

There is no equitable relief against a forfeiture for breach of such a covenant: *Barrow v. Isaacs and Sons* [1891] 1 Q. B. 417; 60 L. J. (Q.B.) 179; *Eastern Telegraph Co. v. Dent* [1899] 1 Q. B. 835; 68 L. J. (Q.B.) 564.

And the statute just noted expressly excludes such power in Ontario: *Curry v. Pennock* (1913) 4 O. W. N. 712, 23 O. W. R. 922, 10 D. L. R. 166 [Meredith, C.J.C.P.], affirmed (1913) 24 O. W. R. 357, 4 O. W. N. 1065, 10 D. L. R. 548 [App. Div.].

But in Alberta the rule is different. In *Royal Trust Co. v. Bell* (1909) 12 W. L. R. 546, Beck, J., relieved from a forfeiture in such a case, holding that the Judicature Ordinance as amended in 1907 [see p. 765, *post*] was wider than the English Act.

In *McCallum, Hill & Co. v. Imperial Bank* (1914) 7 W. W. R. 981 [Sask.], Lamont, J., points out that *Barrow v. Isaacs & Sons* (*supra*) does not apply where leave is unreasonably withheld, although the lease provides that it is not to be. This is discussed and these covenants considered at length at p. 1063, *post*.

*"The Proceedings and Conduct of the Parties under the Foregoing Provisions."*

In *Rose v. Spicer: Rose v. Hyman* [1911] 2 K. B. 234, already considered at some length [at p. 616, *ante*], the majority of the Court of Appeal [Cozens-Hardy, M.R., and Moulton, L.J.], laid down the rule that the applicant must come into Court with clean hands and ought not to be relieved if he avows an intention to continue or to repeat a breach of covenant. This view was criticized in (1911), 31 C. L. T., at p. 662 *et seq.*, and the dissenting judgment of Buckley, L.J., favored as the better exposition of the law. This judgment [see p. 616, *ante*] was

approved by the House of Lords in reversing the Court of Appeal: *Hyman v. Rose* [1912] A. C. 623. Buckley, L.J., was of the opinion that the changes made were no greater than might reasonably be made having regard to the right of the applicants—upon which they were insisting, hence the language of the Master of the Rolls—to change the user of the premises, and he considered they were entitled to relief. The applicants were willing to deposit a sum of money sufficient for the restoration of the premises to their original state at the end of the lease.

The Court is bound under this section to have regard to the conduct of the parties . . . “but it is significant that the sub-section refers to ‘parties’ and regard must, therefore, be had to the conduct of the lessor as well as of the lessee. It may be unreasonable for the lessor to seek to interfere with the lessee’s mode of enjoyment of the premises, even though this may not be strictly in accordance with the terms of the lease”: 31 C. L. T. at p. 666.

Middleton, J., held, in an action to forfeit a lease for breach of the covenant against waste that mere alterations to make the building more suitable for the business carried on therein were not a breach of the covenant, and that in any case relief against any such forfeiture would be granted upon payment into Court of such amount as would ensure a return of the premises to their old plight and condition at the expiration of the lease: *Hyman v. Rose* [1912] A. C. 623, followed; *Holman v. Knox*, 25 O. L. R. 588, modified: *Sullivan v. Doré* (1913) 25 O. W. R. 31, 5 O. W. N. 70, 13 D. L. R. 910.

In *McPherson v. Giles* (1919) 45 O. L. R. 441, 16 O. W. N. 183, Clute, J., considered the amount of compensation for damages for waste in cutting down trees under the circumstances set out at p. 1106, *post*.

In *Straus v. International Hotel Windsor, Ltd.* [*ante* p. 636], the change made by the defendants in the building could not lawfully have been made, it was admitted, without the consent of the plaintiffs. The plaintiffs did consent to a change in the external front of the building by making a one-store entrance with one door; but the

defendants made a two-store entrance with two doors: Held, that the difference was substantial, and the defendants were wrongdoers: if the building was better than it would have been had the change been limited to what was consented to, that did not help the defendants: the plaintiffs were entitled to damages for the wrong done; and the damages were assessed by the Appellate Court at \$200, subject to a reference if either party desired it. The damages for sub-letting without leave were merely nominal, and need not be considered.

Riddell, J., said [45 O. L. R. 145, p. 151]: "There are several courses open to us: we might direct the tenants to reinstate the building as it was before the change (not to the state contemplated by the consent given to change—that consent is nugatory), either at once or on the completion of the tenancy, giving security in the meantime for such reinstatement. Either course, in my view, is inadvisable. I cannot think that there would be any increase in the value of the building at all corresponding to the expense, and consequently the defendants would be penalised without corresponding advantage to the plaintiffs. The third course is to treat this as a simple common law action and give the plaintiffs damages for the wrongs complained of. This, in my view, is the best course to pursue. I do not think that, on the evidence before us, we can make a satisfactory estimate of what these damages are. I would, however, fix them at \$200, and allow either party to take a reference at their own risk as to costs."

#### *The Provisions of the Judicature Acts.*

"The Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as may be deemed just." [R. S. O. 1914 c. 56, s. 19].

This provision is copied from the Imperial Statutes: 49 Vic. c. 16, s. 38, 58 Vic. c. 12, s. 52 (3).

#### *Similar Legislation.*

Alberta: (1919) 9 Geo. V. c. 3, s. 35 (8) [Judicature Act].



British Columbia: R. S. B. C. 1911, c. 133, s. 2 (14) [Laws Declaratory Act].

New Brunswick: (1909) 9 Edw. VII. c. 5, s. 18 (2). [Judicature Act].

Nova Scotia: R. S. N. S. 1900, c. 155, s. 19 (4) [Judicature Act].

Manitoba: R. S. M. 1913, c. 46, s. 25 (*p*) [King's Bench Act].

Ontario: R. S. O. 1914, c. 56, s. 19 (Judicature Act), from which the above is taken.

Saskatchewan: (1915) 5 Geo. V. c. 10, s. 24 (5).

In provinces which have passed the Acts referred to at p. 732, *ante*, the Courts would probably be precluded from granting a tenant relief in respect of breaches of covenants excepted from the operation of the Acts: *Holmsted*, Ontario Judicature Act, p. 91.

But, in Alberta, where the above section is the only statute dealing with the matter, the Courts relieve against forfeiture under it.

In *Royal Trust Co. v. Bell* (1909) 12 W. L. R. 546 [Alta.], Beck, J., held that the section as amended in 1907 by 7 Edw. VII. c. 5, s. 7, was wider than the English Act, and enabled him to relieve against a forfeiture for breach of a covenant not to assign.

In *Warner v. Linahan* [1919] 2 W. W. R. 94, 14 Alta. L. R. 432, 46 D. L. R. 31 [App. Div.], Simmons, J., relieved against a forfeiture for breach of a covenant to rid lands of noxious weeds, and his judgment was sustained by an evenly divided Court: Harvey, C.J., and Ives, J., being of the opinion that the forfeiture should not be relieved against: Beck and McCarthy, JJ., holding the contrary opinion. The judgment of Harvey, C.J., is referred to at p. 756, *ante*.

In *Balagno v. Leroy* (1913) 18 B. C. R. 127, 23 W. L. R. 621, 3 W. W. R. 1124, 10 D. L. R. 601 [B.C.—Gregory, J.] relief was given against forfeiture for non-payment of rent under this section.

In *Ryan v. Turner* (1904) 14 M. R. 625, at p. 626: 24 C. L. T. 255, *Perdue, J.*, said of this provision: "I very much doubt whether this provision extends to the sum-

mary proceedings in the Landlord and Tenants Act. Even if it does apply . . . such relief will not be granted where the covenant has been deliberately broken, and where this breach is not the result of accident or mistake: *Barrow v. Isaacs* [1891] 1 Q. B. 417. Nor can a judge enter into a consideration of the motives of the landlord in insisting upon the forfeiture or a discussion as to whether his conduct is reasonable or just under the circumstances."

Compare *Re Bagshaw and O'Connor* [p. 754] with this decision.

In *Tucker v. Armour* (1906) 5 W. L. R. 35, 6 W. L. R. 93, 6 Terr. L. R. 388 [N. W. T.—Full Ct.], it was held that an assignee of a term was entitled to relief against forfeiture for non-payment of rent without the issue of a writ of ejectment upon payment of the rent due. It was also held that the assignee might maintain his action without joining his assignor, and although his assignment was not registered. The original lease was under the Land Titles Act (1894) and was registered.

Forfeiture for non-payment of rent was relieved against where the non-payment was the result of inadvertence and there was evidence of an oral arrangement, that in the event of the tenant's absence at any time the forfeiture clause for non-payment of rent would not be enforced. No third party interests had intervened, and the tenant was given costs: *Huntting v. McAdam* (1908) 8 W.L.R. 214, 13 B.C.R. 426 [Full Ct.], affirming *Hunter, C.J.* (1907) 6 W. L. R. 501, and applying *Newport v. Bingham* (1895) 82 L. T. N. S. 852.

An injunction was granted to restrain a landlord from re-entering for the alleged breach of a covenant to plough, it being inadvisable or impracticable to plough in the seasons in question: *Alexander v. Walters* (1909) 10 W. L. R. 441 [B. C.—Morrison, J.].

In *Webb v. Box* (1909) 19 O. L. R. 540 [Div. Ct.], it was held that no relief could be given under this section to a lessor who had become liable for double value by distraining and selling where no rent was due [see p. 381, *ante*].

The covenant in a lease to cultivate the demised land "in a husbandlike and proper manner" means to cultivate according to the course of farm cultivation and management in that part of the country where the land is situate; and where the cultivation was of a class to fulfil the requirements of the covenant, an action for possession based on forfeiture for breach was dismissed. *Coulter v. McCarter* (1911) 17 W. L. R. 720; 4 Sask L. R. 178.

See also *Edwards v. Fairview Lodge* [1920] 3 W. W. R. 867 [B. C.—Murphy, J.].

### *The Effect of Forfeiture.*

It may be laid down as a general rule that he who enters for condition broken shall be seised or possessed of that estate which the lessor had at the time of the estate made upon condition and he may avoid all mesne charges and incumbrances: Co. Lit. 202; Bac. Abr. Tit. Conditions (O. 4); *Spotswood v. Barrow* (1850) 5 Exch. 110-113; *Doe d. Daniel v. Woodroffe* (1842) 10 M. & W. 608-632; *Lows v. Telford* (1876) 1 A. C. 414; and the statutory lease gives to the lessor on re-entry the right to "re-possess and enjoy as of his or their former estate": [see p. 1114, *post*] and the wording of the implied powers referred to at p. 163, *ante*, is to the same effect. And we have already seen [p. 163, *ante*] there is an implied right of entry with a similar result on non-payment of rent. The right to remove tenant's fixtures in such a case is dealt with at p. 853, *post*.

The right to distrain has already been considered [p. 418, *ante*] as has the right to sue for rent [p. 331, *ante*].

### *Sub-Leases.*

In the absence of statutory provision, a sub-lessee is liable to distress or eviction if the covenants in the original lease are not performed: *Laur v. White* (1868) 18 U. C. C. P. 99; *Leonard v. Buchanan* (1842) 6 O. S. 407; *Arnsby v. Woodward* (1827) 6 B. & C. 519; *O'Donoghue v. Coalbrook Co.* (1872) 26 L. T. 806 [Ex. Ch.].

So when a lessor re-enters on a forfeiture, the rights of under-lessees are gone: *Great Western Railway Co. v. Smith* (1817) 3 A. C. 165; 47 L. J. (Ch.) 97; 37 L. T. 645; and *Creswell v. Davidson* (1887) 56 L. T. 811.

The Conveyancing and Law of Property Act of 1881 [see p. 733] did not give an under-lessee any right of relief against forfeiture for breach of a covenant or condition in the head-lease: *Burt v. Gray* [1891] 2 Q. B. 98.

In 1892, however, relief was provided for by another statute. The Ontario Landlord and Tenants' Act, R. S. O. 1914, c. 155, now contains the following provisions:

21. "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, the Court, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, may make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the Court in the circumstances of each case shall think fit; but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

This section first appeared in the Act in 1911 [see 1 Geo. V. c. 37, s. 21]. It is copied from the Conveyancing and Law of Property Act of 1892; 55-56 Vic. [Imp.] c. 13, s. 4.

#### *Similar Legislation.*

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 11, is copied from the Ontario Act.

This relief may be given to a sub-lessee even where the head-lease is being forfeited for non-payment of rent, a result not possible apparently under s. 14 of the

Imperial Act of 1881 [see p. 733, *ante*]; *Gray v. Bonsal* [1904] 1 K. B. 601; 73 L. J. K. B. 515; 20 T. L. R. 335; 24 C. L. T. 151 [C.A.].

But if the forfeiture arises from a breach within s. 14 (6) of the Act of 1881, as for example the breach of a covenant not to assign the demised premises, the sub-lessee must show that he himself is free from blame: *Hurd v. Whalley* (1919) 88 L. J. (K.B.) 260 [McCardie, J.].

In this last case relief was given where there had been breach of a covenant to repair, even though the sub-lessee had as against his lessor been guilty of the same breach. The head lease demised five houses: the sub-lessee was tenant of one.

The jurisdiction under this section is to be exercised with caution and sparingly: *Imray v. Oakshette* [1897] 2 Q. B. 218; 66 L. J. (Q.B.) 544 [C.A.], considered in *Matthews v. Smallwood* [1910] 1 Ch. 777; 79 L. J. (Ch.) 322.

In *Ping Lee v. Crawford* (*ante*, p. 758), the question of who was an under-lessee was considered.

The under-lessee given relief was ordered to pay the costs in *Ewart v. Fryer* (1902) 86 L. T. 676; 18 T. L. R. 590; 18 C. L. T. 264.

“22. Where a lessor is proceeding by action to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, every person claiming any right, title or interest in the demised premises under the lease, if it be known to the lessor that he claims such right or interest, or if the instrument under which he claims is registered in the proper registry or land titles office, shall be made a party to the action.”

[New in 1911: see 1 Geo. V. c. 37, s. 22. Copied in Saskatchewan 1919: 9 Geo. V. c. 79, s. 12.]

Riddell, J., suggests an application of this section in *Straus Land Corporation Ltd. v. International Hotel Windsor Limited* (1919) 45 O. L. R. at p. 150 [see p. 763, *ante*], but does not pursue it.

“23. In every lease made after the 24th day of March, 1911, containing a covenant, condition or agreement against assigning, underletting or parting with the possession, or disposing of the land or property leased without license or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that such license or consent shall not be unreasonably withheld.

[New in 1911: see 1 Geo. V. c. 37, s. 37, s. 23; amended by (1914) 4 Geo. V. c. 2, Sch. (26); copied in Saskatchewan 1919; 9 Geo. V. c. 79, s. 13].

### NOTICES TO QUIT.

ARTICLE 118.—Without a notice to quit or an actual or implied surrender or merger a periodic tenancy would continue in the tenant and his assigns or representatives, and the immediate reversion would continue in the landlord and his assigns or representatives until extinguished by Statute of Limitations.

[Authorities: *Maddon d. Baker v. White* (1787) 2 T. R. 159; *Doe d. Landsell v. Gower* (1851) 17 Q. B. 589; 21 L. J. (Q.B.) 57].

A notice to quit is a certain reasonable notice required by law or by custom, or by special agreement to enable either the landlord or the tenant, or the assignees or representatives of either of them, without the consent of the other, to determine a tenancy from year to year or from two years to two years, or other like indefinite period: *Cole Ejec.* 30.

Termination of Tenancies at Will are dealt with at p. 798, *post*; Tenancies at Sufferance at p. 804, and Tenancies for Life at p. 805, *post*.

Upon the expiration of a notice to quit duly given by either party the tenancy ceases, and unless a fresh tenancy be afterwards created, the landlord cannot distrain for subsequent rent, notwithstanding the tenant con-

tinues in possession for a year or more after the expiration of the notice: *Alford v. Vickery* (1842) Car. & M. 280.

Where the tenancy is for a term certain, the tenant is bound to quit at the end of the term without notice. See Article 125, p. 805, *post*, and *City of Toronto v. Ward* (1908); 18 O. L. R. 214 [Britton, J.].

A notice to quit is not rendered unnecessary by the death of the landlord: *Madden d. Baker v. White* (*supra*); or of the tenant: *Gulliver d. Tasker v. Burr* (1766) 1 W. Blac. 596; nor by an assignment of the term: *Doe d. Castleton v. Samuel* (1804) 5 Esp. 173; or of the reversion: *Birch v. Wright* (1786) 1 T. R. 378. But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be: *Cole Ejec.* 35; and see p. 1006, *post*.

### *When no Notice is Required.*

Notice to quit is only required to terminate the relation of landlord and tenant.

A servant who occupies premises as part remuneration for his services may be ejected without notice when the services cease: *Mayhew v. Tuttle* (1854) 4 El. & Bl. 347.

The general rule is that when a person holds a house by virtue of his office, such as minister of a church, and then loses that office, he is bound to give up possession without a notice to quit: *Bigelow v. Norton* (1846) 3 N. S. R. 283; so is an intended purchaser who is let into possession until a given day on certain terms: *Right d. Lewis v. Beard* (1811) 13 East, 210; for there is no tenancy: see p. 20, *ante*.

Where a mortgage is made without any clause entitling the mortgagor to hold possession until default, the mortgagor in possession is not entitled to any notice to quit, nor even to a demand of possession before ejectment: *Doe v. Tom* (1843) 4 Q. B. 615. But where the instrument is executed under the Short Forms Acts and contains the proviso giving the mortgagor the right to

possession until default, the foregoing rule does not apply, for this stipulation amounts to a redemise: *Keech v. Hall* (1778) 1 Doug. 21; *Ford v. Jones* (1862) 12 U. C. C. P. 358; *Trust and Loan Co. v. Lawrason* (1882) 10 S. C. R. 706. So in all cases of attornment or tenancies between the mortgagor and mortgagee, regard must be had to the means of ending the same: see p. 213, *ante*.

Where a mortgagee brought an action of ejectment against the tenant in possession under a lease from the mortgagor, and it appeared that the tenant refused to attorn to the mortgagee (who demanded possession), and showed no lease nor any certain holding, he was held not entitled to any notice to quit: *Doe d. Sampson v. Parker* (1836) 4 U. C. (Q.B.) O. S. 36.

It seems that notice to quit need not be given by or to a corporation aggregate where there has been no demise under seal, and that either party may determine the tenancy at any time without notice. This question is considered at pp. 29 and 343 (*ante*).

A tenant in possession after the expiration of his lease is in the same position as a tenant after a forfeiture or regular notice to quit, and where a tenant overholds for a considerable time and the landlord asks him to pay rent, but none is paid or promised, in consequence of the demand he may be ejected without notice to quit or demand of possession: *Burritt v. Dunham* (1846) 4 U. C. R. 99.

Notice to quit or demand of possession is not necessary before action brought upon a forfeiture where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let upon breach of which ejectment is brought: *Connell v. Power* (1863) 13 U. C. C. P. 91; and where an estate expires on a condition and there is a consequent right of entry for condition broken no notice to quit is necessary: *Sheldon v. Sheldon* (1863) 22 U. C. R. 621; *Eckhardt v. Raby* (1861) 20 U. C. R. 458.

#### *Yearly Tenancies.*

The right to determine a tenancy from year to year by a notice to quit is a necessary incident to such tenancy: *Doe d. Warner v. Browne* (1807) 8 East. 165.



A tenant from year to year whose tenancy commences before a mortgage is entitled to the usual notice to quit: *Doe v. Lewis* (1844) 13 M. & W. 241. But if the tenancy commence after the mortgage, no notice to quit or demand of possession is necessary: [see p. 213, *ante*]; provided, of course, there has been no attornment to the mortgagee: *Doe d. Sampson v. Parker* (1836) 4 U. C. Q. B. (O.S) 36.

The notice must in the absence of special stipulation be a reasonable notice: *Doe d. Martin v. Watts* (1797) 7 T. R. 83.

See also *Mitchell v. Turner* (1919) 63 S. J. 776.

### *The Notice Required at Common Law.*

The tenancy may—in the absence of some special stipulation to the contrary—be determined by half a year's notice, expiring at the end of the first or any subsequent year of the term: *Doe d. Clarke v. Smaridge* (1845) 7 Q. B. 957; *Doe d. Plumer v. Mainby* (1847) 10 Q. B. 473; *Birchall v. Reid* (1874) 35 U. C. R. 19.

Where a tenancy from year to year is created by express agreement and there is no special stipulation providing for the determination of the tenancy, the usual notice to quit required by law, *i.e.*, a half year or 182 days notice to quit at the end of the first or some other year of the tenancy must be given: *Right d. Flower v. Darby* (1786) 1 T. R. 159; *Doe d. Pitcher v. Donovan* (1809) 1 Taunt. 555; *Duppa v. Mayo* (1668) 1 Wms. Saund. 385, ed. 1871; *Von Ferber v. Enright* (*post*).

It is advisable that a notice to quit in the case of a yearly tenancy should be “at the expiration of the year of your tenancy which shall expire next after the end of one-half year from the service of this notice”: See *Poole v. Warren* (1838) 8 A. & E. 582; *Ackland v. Lutley* (1839) 9 A. E. 879.

But where a tenancy commenced on the 19th of May, it was held that a notice served on the 17th November, to quit on the 19th of May following was good, though a notice to quit on the 18th or the last day of the current year would also be good. It is well settled that the

notice ought to expire on the last day of the current year: *Sidebotham v. Holland* [1895] 1 Q. B. 378; 11 T. L. R. 154 [C.A.]; *Kemp v. Derrett* (1814) 3 Camp. 510; *Doe d. Cornwall v. Matthews* (1841) 11 C. B. 675; *Lewis v. Baker* [1905] 2 K. B. 576, affirmed [1906] 2 K. B. 599 [C.A.]; *Burrows v. Mickelson* (1904) 14 M. R. 739; 24 C. L. T. 326.

There is no distinction between tenancies commencing at a particular time or on a particular day, or from the same day; "at," "on," "from," or "on and from," are for this purpose equivalent expressions: *Sidebotham v. Holland* (*supra*), per Lindley, L.J.

Where a tenant entered into possession on the 1st of January, 1903, and held over, becoming a tenant from year to year, a notice given on 29th December, 1904, to quit on 1st July, 1905, was held inoperative; it was not a notice to determine the tenancy at the expiration of some year of the tenancy: *Re Hardisty and Bishopric* (1905) 2 W. L. R. 21; 25 C. L. T. [N.W.T.—Scott, J.] A lease for a term expiring 1st April, 1908, contained a proviso for three months' notice to quit. A new lease was made in December, 1907, for five years, and the lessor wrote on it: "This lease is not to affect the present lease to April first next . . ." The lessee remained in possession. In March, 1909, a notice to quit on 1st July, 1909, was given. It was held that the proviso as to notice was not continued in the new lease if the defendant were in possession under it and if he were holding over in any event its effect would only be to shorten the usual half-year's notice to three months, and that such notice must expire at the end of the first or some other year of the tenancy and not at any other part of the year: *Doe d. Pitcher v. Donovan* (*supra*) and *Dixon v. Bradford* [1904] 1 K. B. 444, followed: *Van Ferber v. Enright* (1909) 12 W. L. R. 217 [Man.—Metcalf, J.]; 30 C. L. T. 450.

Where the tenant enters in the middle of a quarter and pays rent for the broken period to the next regular quarter day and subsequently pays his rent from quarter to quarter, his tenancy will be deemed to have com-

menced not when he first entered, but at the ensuing quarter day and notice to quit should be given accordingly: *Doe d. King v. Grafton* (1852) 18 Q. B. 496. But if he has not paid any rent, the tenancy will be deemed to have commenced on the day when he entered and notice to quit at that time will be good: *Doe d. Cornwall v. Matthews* (*ante*).

Where different parts of the demised premises are entered upon at different times, the notice should be to quit at corresponding periods, "or at the expiration of the year of the tenancy which will expire next after the expiration of half a year from the delivery of this notice": *Doe d. Williams & Ayrane v. Smith* (1836) 5 A. & E. 350; and see *Sidebotham v. Holland* (*ante*). Such notice will be sufficient for the whole of the premises if served in time for the principal subject of demise: *Doe d. Daggett v. Snowdon* (1778) 2 W. Blac. 1224; *Doe d. Strickland v. Spence* (1805) 6 East, 120.

Where a tenancy from year to year is implied by law from the payment and acceptance of rent, or from other circumstances, [see p. 195, *ante*, Article 24] a half year's notice to quit at the end of the first or some other year of the tenancy must be given: *Doe d. Wawn v. Horn* (1838) 3 M. & W. 333; *Doe d. Cates and Others v. Somerville* (1826) 6 B. & C. 126, 132; *Manning v. Dever* (1874) 35 U. C. R. 294.

It has been considered that such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly: *Roe d. Jordan v. Ward* (1789) 1 H. Blac. 96; *Doe d. Collins v. Weller* (1798) 7 T. R. 478; *Doe d. Spicer v. Lea* (1809) 11 East 312; and that is the law laid down in *Cole on Ejectment*: (1857) p. 50.

This was followed in many of the text-books and was applied even where the original term did not cease at the same time of the year at which it commenced.

The English Court of Appeal in a recent case has decided that the rule is otherwise in this latter case. It held that where a demise is for a year or years and a portion of a year—in this case one year and one-eighth

of a year from November 11th, 1915, rent payable on the usual quarter days—and a new term is created by holding over and paying rent [see Article 24]; that tenancy from year to year is determinable on the anniversary of the determination, and not of the commencement of the term. Hence a notice to quit given on June 8th, 1917, as from June 24th, 1917, to determine the tenancy at Christmas, 1917, is a proper notice. *Croft v. Blay Lim.* [1919] 2 Ch. 343; 88 L. J. (Ch.) 545 [C.A.] affirming a judgment of Astbury, J. [1919] 1 Ch. 277; 88 L. J. (Ch.) 153. This case distinguished *Doe d. Robinson v. Dobell* (1841) 10 L. J. Q. B. 242; 1 Q. B. 806; *Berrey v. Lindley* (1841) 11 L. J. (C.P.) 27; 3 Man. & G. 498; and *Kelley v. Patterson* (1874) 43 L. J. (Ch.) 320; L. R. 9 C. P. 681.

In *Re Lyons and McVeity* (1919) 46 O. L. R. 148 [App. Div.] Riddell, J., refers to the Croft case, saying, p. 152, that it “contains a discussion which is helpful in some particulars, but which cannot be called conclusive.”

#### *When the First Notice May be Given.*

But where a tenancy is created for “one year certain, and so on from year to year,” it enures as a tenancy for two years at the least, and cannot be determined by notice to quit at the end of the first year: *Doe d. Chadborn v. Green* (1839) 9 A. & E. 658; *Doe d. Monck v. Geekie* (1844) 5 Q. B. 841.

A tenancy “from year to year so long as both parties please” is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least: *Doe d. Clarke v. Smaridge* (ante); *Doe d. Plumer v. Mainby* (ante); and see *Austin v. Newham* [1906] 2 K. B. 167.

A tenancy for “twelve months certain and six months’ notice afterwards” may be determined by notice to quit at the end of the first year: *Thompson v. Maberley* (1811) 2 Camp. 573; *Brown v. Symons* (1860) 8 C. B. N. S. 208; 29 L. J. (C.P.) 251; see, however, *Gardner v. Ingram* (1889) 61 L. T. 729; 6 T. L. R. 75, where *Thompson v. Maberley* was questioned.

But a demise "not for one year only, but from year to year," has been held to constitute a demise for two years at least; *Denn d. Jacklin v. Cartwright* (1803) 4 East, 31. A tenancy for six months, and so on from six months to six months until determined by either party, is a tenancy for one year at least: *R. v. Chawton (Inhabitants)* (1841) 1 Q. B. 247. So a lease for three years, and so on from three years to three years, makes one term for six years: *Hennings v. Brabason* (1660) 2 Lev. 45. Such tenancy may be determined by a half-year's notice to quit expiring at the end of the first six years, or of any subsequent period of three years, but not at any other time: *Roe v. Lees* (1778) 2 W. Blac. 1171; *Hennings v. Brabason (supra)*.

A demise for "a term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice, and if not then determined a subsisting tenancy from year to year. Such a demise cannot be determined by a notice to quit at the end of the first or second of the three years: *Jones v. Nixon* (1862) 1 H. & C. 48; 31 L. J. (Ex.) 505; *Brown v. Trumper* (1858) 26 Beav. 11.

*Cannon Brewery v. Nash* (1898) 77 L. T. 648 [C.A.], a lease for six months and so on from six months to six months until six calendar months' notice is given is for a year at least.

Where a lease is made for one, three or five years, it seems that no notice to quit need be given by the lessor to determine it at either of these periods: *Osborne v. Earnshaw* (1862) 12 U. C. C. P. 267.

A lease provided for a tenancy to commence on September 1st, 1918, and to "continue from year to year until determined by three calendar months' notice to quit, which may be given on either side and at any time." Held that the tenancy created was a yearly tenancy, which could not be terminated until the expiration of at least one year, and a notice given on the 29th April, 1919, to quit on the 2nd August, 1919, was bad: *Mayo v. Joyce* (1920) 89 L. J. (K.B.) 561; [1920] 1 K. B. 824. [Div. Ct.].

*The Notice Required by Statute.*

In New Brunswick when any lands shall be let requiring a notice to quit, the notice shall be as follows: for the year, or half year, three months, for the quarter or month, one month, and for the week one week: C. S. N. B. 1903, c. 153, s. 27.

In Nova Scotia, when let by the year, three months' notice is required, when by the month one month, and when by the week one week's notice, in either case "to or by" the tenant: R. S. N. S. 1900, c. 172, s. 16.

By s. 16 (2) "such notice shall be sufficient although the day on which the tenancy terminates is not named therein."

But it is probable from the wording of these Acts that these statutes do not refer to implied tenancies from year to year, but only to express lettings for the periods specified.

*The Notices Required by Agreements.*

The parties may expressly stipulate for a longer or a shorter notice to quit than that usually required by law: *Doe d. Pitcher v. Donovan* (1809) 1 Taunt. 555; *Re Threlfall, Ex parte Queen's Benefit Building Society* (1880) 16 Ch. D. 274; 50 L. J. (Ch.) 318; *Bridges v. Potts* (ante); *King v. Eversfield* [1897] 2 Q. B. 475; *Dixon v. Bradford and District Railway Servants' Coal Supply Society* [1904] 1 K. B. 444; *Lewis v. Baker* (ante); *Re Rabinovitch and Booth* (1914) 31 O. L. R. 88 [App. Div.]; 19 D. L. R. 296; 6 O. W. N. 58; or for a notice expiring at some other period of the tenancy than at the end of the first or some other year, e.g., at the end of any quarter: *Kemp v. Derrett* (infra); or at some particular quarter: *Doe d. Rigge v. Bell* (1793) 5 T. R. 471; or at any time of the year upon the expiration of a certain specified previous notice: *Bridges v. Potts* (1864) 17 C. B. (N.S.) 314.

Where there is an express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually

required by law, must be given and will be sufficient: *Doe d. Robinson v. Dobell* (1841) 1 Q. B. 806; *King v. Eversfield* (*supra*). But less than the stipulated notice will be bad: *Doe d. Peacock v. Raffan* (1806) 6 Esp. 4.

Sometimes a lease is made for a term of years subject to a proviso or power therein contained enabling one or both of the parties to determine it at an earlier period by notice: *Seldon v. Buchanman* (1893) 24 O. R. 349. But if the right to give such notice be subject to any condition precedent, then all the prior conditions must be performed: *Friar v. Grey* (*post*); *Burch v. Farrow's Bank* [1917] 1 Ch. 606 [a repairing covenant not complied with—notice invalid]; and the notice must of course be given according to the terms of the power.

An agreement to give six months' notice to quit means *prima facie* six lunar months, and cannot be explained to mean calendar months by evidence of the usage of a particular estate: *Rogers v. Kingston-upon-Hull Dock Co.* (1864) 34 L. J. (Ch.) 165; 11 L. T. 42; 12 W. R. 1101; 13 W. R. 217.

The word month in a legal document means a lunar month, unless there is something to show that a calendar month is meant: *Simpson v. Margitson* (1847) 11 Q. B. 23; *Nudell v. Williams* (1865) 15 U. C. C. P. 348. Though in an Act of Parliament requiring a month's notice to quit in the case of a monthly tenancy, a calendar month's notice is intended; and a provision in a lease as to "calendar" month's notice will be given effect: *Quartermaine v. Selby* (1889) 5 T. L. R. 223.

A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants, it was held, in error, that

the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease: *Friar v. Grey* (1854) 5 Exch. 584, 597; 4 H. L. Cas. 565; see however, *Grey v. Friar* (1854) 15 Q. B. 901.

Where a new tenancy was created by overholding and payment of rent, it was held that a proviso in the original lease for termination of the term "at the end of any one month" was not inconsistent with the new tenancy; and that these words meant at the end of any month of the tenancy: *Re Rabinovitch v. Booth* (*ante*); and see *Von Ferber v. Enright*, *ante*, p. 774.

Where a lease was made for one year with the privilege of holding for an indefinite time on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year by either party so inclined, it was held that the lessee was bound to give three months' notice of his intention to quit at the end of the first year: *Counter v. Morton* (1851) 9 U. C. R. 253.

The notice provided for must not exceed the period of the tenancy for that would be repugnant to the nature of the estate created: *Doe d. Warner v. Browne* (1807) 8 East, 165, and see *Allison v. Scargill* (1920) 89 L. J. (K.B.) 1084, but an agreement by the lessor not to give notice to quit so long as a stipulated condition—such as for punctual payment—is observed will be specifically performed: *Zimble v. Abrahams*, [1903] 1 K. B. 577.

Where a lease for a year provided for its termination "by giving one full month's notice," it was held immaterial on what date the notice was given so long as the notice was for a full month at least: *Osment v. Dundas* (1903) 7 Terr. L. R. 339; [Richardson, J.] *Dundas v. Osment* (1905) 1 W. L. R. 363; [N.W.T.—Newlands, J.]. This last case was a motion made in the course of the action reported: 4 W. L. R. 116; 6 W. L. R. 86; 7 Terr. L. R. 342, dealt with at p. 885.

A lease for three years at a monthly rental provided that at the "expiration of the said term of three years," the lessee might hold and enjoy the said premises from month to month so long as might be agreed, and "that



each party be at liberty to quit possession on giving the other three months' notice in writing." It was held that the notice to quit given by the landlord less than four months after the date of the lease came within this provision: *Aylwin v. Robertson* (1904) 7 Terr. L. R. 164 [N.W.T.—Wetmore, J.].

*Agreement Dispensing with Notice.*

A notice to quit may be dispensed with by special agreement. Thus a tenant may be allowed to quit without notice upon the happening of a particular event: *Bethell v. Blencowe* (1841) 3 M. & G. 119; 10 L. J. (C.P.) 243.

Where the defendant had gone into possession of land under a demise for four years which was void under the Statute of Frauds, and before the expiration of the first year the lessor told him that he should want the land in the spring and defendant agreed to give it up then, it was held that there was no necessity for proving a formal notice to quit: *Doe d. Lynde v. Merritt* (1846) 2 U. C. R. 410.

So a lessor may be given a power to determine a tenancy from year to year without any notice: *Re Threlfall, Ex parte Queen's Benefit Building Society* (1880) 16 Ch. D. 274; 50 L. J. (Ch.) 318 [C.A.].

On the 1st of April, 1858, certain land was let for five years at £100 a year, payable half yearly, on the 1st April and October, in advance, and the lease contained the following provision: "It is mutually agreed on between the said parties, that is if S. E. (the lessor) requires the premises before the term expires he is to pay £50 to W. R. (the lessee) for possession; otherwise should W. R. require to leave before the term he has to pay S. E. £50." On the 6th September, 1860, the latter notified W. R. that he would require the premises on the 10th of October following, and on that day he tendered the £50, which W. R. refused. It was held that this constituted a condition rather than a covenant, and that S. E. was entitled to maintain ejectment without giving

six months' notice to quit: *Eckhardt v. Raby* (1861) 20 U. C. R. 458.

*Agreements to Vacate on Notice if Premises Sold.*

Analogous to notices to quit are notices given pursuant to agreements to that end, even where the tenancy is for a fixed period.

Where a lessee agrees to vacate on a certain notice in the event of the demised premises being disposed of, an agreement to sell, though not enforceable under the Statute of Frauds, is a disposition entitling the landlord to give the notice, and the notice is not an untrue notice: *Lumbers v. Gold Medal Furniture Manufacturing Co.* (1900) 30 S. C. R. 55; 19 Occ. N. 375; reversing the Ontario Court of Appeal (1899) 26 A. R. 78; 19 Occ. N. 62, which had affirmed *Rose J.* (1898) 29 O. R. 75; 18 Occ. N. 64.

In *Rink v. Milos* [1918] 2 W. W. R. 1021 [Sask.—C.A.] the lease (which was for five years) provided that "the said lessor shall have the right to sell the said land at any time provided that said lessor pays the said lessee at the rate of two and one-half (\$2.50) dollars per acre for each and every acre plowed; and for each and every acre in shape ready for crop four (\$4.00) dollars per acre, and in case the land is seeded, then the said lessee shall have the right for his share of the crop as above described for that year, and the lessor can sell and assign only his share of the crop, viz.: One-third of the crop over that year."

The lessor's husband, as her agent, negotiated a sale and had the agreement signed by the purchaser, who entered and ploughed seven acres. Then he left on account of a dispute which had arisen, and the lessor commenced action against the tenant for breach of the covenant to summer-fallow. The Court said, per Lamont, J.A., at p. 1024: "The plaintiff's agent having sold the farm and put the purchaser in possession to the knowledge of the defendant, he was justified in concluding that the plaintiff had exercised the right to sell given her under the lease, and that his lease was therefore at an end.

The fact that the plaintiff allowed [the purchaser] to subsequently withdraw from her agreement to purchase, cannot affect the defendant's right or reinstate a lease which had been determined. The plaintiff, in my opinion, was therefore not entitled to damages. . . ."

A provision in a lease, at a yearly rent payable monthly, entitled the landlord to give three months' notice to quit in case the landlord received an offer to purchase the demised lands, which he was willing to accept. It was held that the notice might be given for any broken period of the term and need not expire at the end of a month of the tenancy: *Smith v. Macfarlane* [No. 2] [1904] 5 Terr. L. R. 508.

Under a clause in a lease permitting the lessor to cancel upon reasonable notice, notice was given on September 8th requiring possession in thirty days. Negotiations took place during which the tenant remained in possession until the following April. The lessor was permitted to recover for use and occupation between October and April: *Gardner v. Holmes* [1918] 1 W. W. R. 456; 24 B. C. R. 416; 38 D. L. R. 156 [C.A.].

Where a lease provided that the tenancy might be determined by six months' notice on either side, to be given on March 1st or September 1st in any year, a letter written on December 23rd giving notice to quit at the earliest possible moment, was held to be a good notice to quit determining the tenancy on August 31st following: *May v. Borup* [1915] 1 K. B. 830; 84 L. J. K. B. 823; 35 C. L. T. 617 [Div. Ct.].

A notice to quit "at the earliest possible moment," means at the next termination of the tenancy in accordance with the terms of the agreement and is not vague or uncertain: *May v. Borup* (*ante*); *Teasdale v. Dwyer* (1915) 9 O. W. N. 330.

In *Wood v. Saunders* (1912) 21 W. L. R. 195; 3 D. L. R. 342 [Sask.—Wetmore, C.J.], the lease provided that either party might terminate the lease at the expiration of any year by giving three months' notice, and also provided that the lessee reserved "the right to sell . . . at any time during the term . . . but, in case a sale

is made at any time after a crop is sown, the lessee shall be entitled to his crop." It was held that under the latter clause a sale put an end to the tenant's rights under the lease, for though the clause did not in words state that such was to be the result of sale, that was the proper inference. It was also held that the two clauses afforded two different ways of terminating the lease, and the three months' notice clause did not apply when the lease was being terminated under the sale clause. Reference may also be made to *Nilan v. McAndless* (1912) 22 W. L. R. 685; 8 D. L. R. 169 [Man.—Macdonald, J.], and *McKay v. Sexsmith* (1914) 29 W. L. R. 210; 20 D. L. R. 986 [Man.—Macdonald, J.].

The lessor cannot give a notice to quit on his own behalf after assigning the reversion, but he may give such notice as agent of the assignee: *Matthews v. Lloyd* (1875) 36 U. C. R. 381.

Where a lease is subject to cancellation on the lessor selling the premises, the latter cannot after conveying away give the notice for the purpose of putting an end to the lease: *Pepper v. Butler* (1876) 37 U. C. R. 253.

*In re Magee and Smith* (1895) 10 M. R. 1, it was held that a notice given by the lessor after the sale with the authority of the purchaser, was sufficient.

### *False Notices.*

A landlord who gives a false notice determining a tenancy is liable for any damages thereby occasioned. By a covenant in a lease of a farm, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labor up to the date of the notice from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. The lessor served a notice that he had sold the farm, in consequence of which the lessee desisted from putting in crops and other work for which he had made preparation, and rented another farm. Upon afterwards ascertaining that the notice was untrue, the lessee

refused to give up possession and sued for false representation, and it was held that he was entitled to recover the damages sustained in consequence of the notice: *Cowling v. Dickson* (1881) 5 A. R. 549; (1880) 45 U. C. R. 94; 2 E. & E. Dig. 10.

In *Lumbers v. The Gold Medal Furniture Manufacturing Co.* (1899) 30 S. C. R. 55; 19 Occ. N. 375, it was held, reversing (1899) 26 A. R. 78; 19 Occ. N. 62 [C.A.], and *Rose, J.* (1898) 29 O. R. 75; 18 Occ. N. 64, that where a lessor who was entitled by the terms of the lease to terminate it on six months' notice, in the event of his disposing of the premises, entered into a verbal agreement, not enforceable under the Statute of Frauds, to sell and gave the notice, he was not liable to his lessees for damages. The notice was given in good faith, the lessor having reasonable grounds for believing he had sold the premises.

### *Quarterly Tenancies.*

Where the tenant is always "to be subject to quit at three months' notice," this is not a yearly but a quarterly holding, and the notice must expire at the end of any quarter from the time of the entry: *Kemp v. Derrett* (1814) 3 Camp. 510; *Towne v. Campbell* (1847) 2 Q. B. 475.

### *The Notice Required at Common Law.*

"Except in the case of a tenancy from year to year, the length of the notice to quit has not been fixed precisely. The general principle is that in the absence of special stipulation 'reasonable notice' must be given": per *Haultain, C.J.S.*, in *Baker v. McCurdy* (1914) 7 W. W. R. 727, at p. 728; 30 W. L. R. 79. Since this was written statutory provision has been made in Saskatchewan: see p. 787, *post*.

As a month's notice is sufficient to determine a monthly tenancy where such notice is given, the Judge should not leave to the jury the question whether the notice is reasonable, for that is matter of law: *Beamish v. Cox* (1885) 16 L. R. Ir. 270, 458 [C.A.].

The lessee of part of a house from L. at \$4 a month, agreed that if L. sold the house he was to leave if he could get another, or, according to some of the witnesses, to leave in a month. L. sold the house and conveyed it on the 7th of August to the vendee W., who wanted immediate possession. L. had previously given the lessee verbal notice to go, and on the 7th August, after he had conveyed, he, at the suggestion of W., gave the lessee a written notice, which W. saw L. sign. The lessee at first promised to go, but afterwards refused, and his property was put out by L. and W. on the 9th September, on which W. took possession. The jury found that the tenancy was to terminate on a month's notice and gave the lessee a verdict for \$100. It was held that the finding must be taken to mean that the lessee was to have a month after the sale, and if the notice was given and the entry made by L. by authority of W., it would be sufficient, but L. could not give the notice for himself after the conveyance: *Matthews v. Lloyd* (1875) 36 U. C. R. 381.

The notice should expire on and with the last day of the period of the tenancy: *Doe d. Spicer v. Lea* (1809) 11 East, 312, followed in *Baker v. McCurdy* (*supra*), where a monthly tenancy began on the first of the month—rent payable in advance—notice was given by the tenant on October 23rd for November 15th. It was held bad as it did not expire on and with the last day of the tenancy, and also ineffective for November 30th, to which date the tenant had paid his rent.

### *Monthly Tenancies.*

A notice to quit served on the 30th April is good, although it be incorrectly dated the 1st of May: *Burrows v. Mickelson* (1904) 14 M. R. 739.

In *Eastman v. Richard* (1899) 29 S. C. R. 438, it was held affirming the Supreme Court of the North-West Territories [2 Terr. L. R. 73] that a month's notice to quit was sufficient.

In *Burgoyne v. Mallett* (1912) 21 W. L. R. 566; 5 D. L. R. 62 [B.C.—Grant, Co.J.], a monthly tenant who had

stated several times he was going to move, left on April 2nd, paying rent up to that time. His occupation began some months previously on the 17th of a month. He was held liable for rent up to April 17th, it being considered that under the circumstances that notice was "reasonable."

*The Notice Required by Statute.*

A month's notice to quit ending with the month is sufficient to determine a monthly tenancy: R. S. O. 1914, c. 155, s. 28 (part).

*Similar Legislation.*

Manitoba: R. S. M. 1913, c. 109, s. 4.

New Brunswick: C. S. N. B. 1903, c. 153, s. 27.

Nova Scotia: R. S. N. S. 1900, c. 172, s. 16. And see *Tom Gung v. Fong Lee* (1915) 48 N. S. R. 317.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 18.

The Ontario Act by ss. 36 and 37 [set out at p. 453 (*ante*)], and the Saskatchewan Act by ss. 27 and 28 [identical with the Ontario sections], provide for service of the notice and that formal defects in the notice shall not invalidate it.

*Weekly Tenancies.*

It is now settled that some notice is required to determine a weekly tenancy: *Bowen v. Anderson* [1894] 1 Q. B. 164, which disapproved *Sanford v. Clark* (1888) 21 Q. B. D. 398, which held no notice was necessary.

But irrespective of the provisions of the statute law on the subject, it is unsettled as to the length of the notice required: see per Haultain, C.J.S., in *Baker v. McCurdy* (1914) 7 W. W. R. 727; 30 W. L. R. 79; *Jones v. Mills* (1861) 10 C. B. N. S. 788, only decides that some notice is necessary, and this case was followed in *Bowen v. Anderson* (*supra*); and see *Burgoyne v. Mallett* [*ante* p. 787].

When there is an agreement as to the notice required in the case of a weekly or monthly tenancy that must prevail, but in the absence of agreement the Court would

be inclined to hold a notice of a week or a month necessary: *Jones v. Mills* (*supra*). And in *Baker v. McCurdy* (*ante*), Haultain, C.J.S., said that "in the case of weekly and monthly tenancies it had been repeatedly held from very early times that a notice equal in length to the period of tenancy is sufficient. It would seem to be a question of fact in each case whether any shorter notice is reasonable." The statute since passed by inference excludes any shorter notice.

### *The Notice Required at Common Law.*

In *Harvey v. Copeland* (1892) 30 L. R. Ir. 412, it was held that a weekly tenancy commencing on Thursday may be determined by a written notice served on Thursday, 5th November, to quit and deliver up possession on or before Friday, 13th November. Two judges were of opinion that a week's notice is necessary to determine such a tenancy, and one that a reasonable notice is sufficient. The proper notice would have been for Thursday, but the majority of the Court held that giving the extra day did not vitiate the notice.

If there be any special stipulation, notice to quit must be given accordingly: *Doe d. Peacock v. Raffan* (1806) 6 Esp. 4; and such notice will of course be sufficient: *Doe d. Parry v. Hazell* (1794) 1 Esp. 94; *Doe v. Scott*, (1830) 6 Bing. 362. In the absence of such express stipulation, a weekly tenant who enters on a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent: *Huffel v. Armistead* (1835) 7 C. & P. 56.

### *The Notice Required by Statute.*

A week's notice to quit ending with the week is sufficient to determine a weekly tenancy: R. S. O. 1914, c. 155, s. 28 (part).

### *Similar Legislation.*

Manitoba: R. S. M. 1913, c. 109, s. 4.

New Brunswick: C. S. N. B. 1903, c. 153, s. 27.



Nova Scotia: R. S. N. S. 1900, c. 172, s. 16.

Saskatchewan: (1919), 9 Geo. V., c. 79, s. 18.

The Ontario Act by ss. 36 and 37 [set out at p. 453 (*ante*)], and the Saskatchewan Act by ss. 27 and 28 [identical with the Ontario sections], provide for service of the notice, and that formal defects in the notice shall not invalidate it.

### THE NOTICE MUST BE UNAMBIGUOUS.

ARTICLE 119.—The notice to quit must be certain and unambiguous in intimating an intention to put an end to the tenancy at a certain time; but there is an apparent difference of opinion as to whether a proposal for a new term vitiates the notice.

Although no particular form of notice to quit need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time. An agreement for a lease for five years provided that the tenancy might be determined "after the expiration of the term of three years out of the term of five years" by six months' notice in writing, expiring at the corresponding quarter day at which the tenancy commenced. The tenant entered into possession on the 29th of September, 1885, and on the 23rd of March, 1888, gave notice as follows: "Kindly take notice that I intend to surrender to you the tenancy of this house on or before the 29th of September, 1888," and this was held no notice to quit. The notice was also bad because there was a tenancy for four years certain and the notice was too soon: *Gardner v. Ingram* (1889) 61 L. T. 729; 6 T. L. R. 75.

A notice as follows, "Feb. 1st, 1864. Mrs. L. will please take notice that the rent of the house she now occupies will be twenty-five pounds per annum commencing May 1st, 1864," (the previous rent having been less than this) is not a notice to quit: *Ladds v. Elliott* (1865) 5 N. S. R. 703.

A notice to quit "at the earliest possible moment" means the next termination of the tenancy in accordance

with the terms of the agreement: *May v. Borup* [1915] 1 K. B. 830; 84 L. J. (K.B.) 823; 35 C. L. T. 617 [Div. Ct.].

The question has frequently arisen as to whether a notice to quit is good if accompanied by a proposal that the tenant shall remain on other terms. The leading case was *Doe d. Matthews v. Jackson* (1779) 1 Doug. (K.B.) 175, where the notice was, "I desire you to quit possession on Lady day next or I shall insist on double rent," it was held sufficiently positive, the latter part being merely a threat as to the consequences of holding over; and see *Doe d. Lyster v. Goldwin* (1841) 2 Q. B. 143.

Then *Ahearn v. Bellman, Sedgwick v. Ahearn* (1879) 4 Ex D. 201 [C.A.], decided that a notice to quit will be good though it makes the tenant an offer of a new term at an increased rent. Thus a notice, otherwise sufficient, was held not invalidated by the following clause: "and I hereby further give you notice that should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be £160, payable quarterly in advance."

There was a lease for 21 years with liberty to the lessee to put an end to the term at the end of seven or fourteen years on giving six months' previous notice. More than a year before the first seven years would expire, the lessee wrote the lessor saying that the rent was £50 too high, "and I shall not be able to stop unless some reduction is made. I desire to give ample time to consider what course to take." The lessor offered a reduction of £30, which the lessee refused, and it was held that the notice not being in the alternative was sufficient: *Bury v. Thompson* [1895] 1 Q. B. 696; 11 T. L. R. 118 [C.A.].

These authorities were discussed by E. D. Armour, K.C., in (1895) 15 C. L. T. at p. 25, where he said: "after all it amounts to a question of construction; and thus one of the greatest dangers is placed in the path of the person giving the notice. What may seem perfectly clear to one person, may appear just as clearly to another

to bear the opposite signification." And at p. 26: "and with great respect for the courts which held otherwise, we should think that on failure of negotiations there should be an absolute notice given."

See also *Norfolk County Council v. Child* [1918] 2 K. B. 805; 87 L. J. (Ch.) 1122.

### FORM OF NOTICE.

ARTICLE 120.—No particular form of notice is necessary and it may be given by parol.

No particular form is necessary, but if given by or on behalf of the landlord, it must in substance and effect request the tenant or other person for the time being legally entitled to the term to quit and deliver up possession of all the demised premises at the proper time, and if given by or on behalf of the tenant it must in substance and effect inform the landlord or other person or persons for the time being legally entitled to the immediate reversion that the tenant will quit and deliver up possession of all the demised premises at the proper time: *Cole Eject.* 46-7.

On the 11th of January, 1892, a tenant wrote to his landlord's agents as follows: "I hereby give you notice that I wish to terminate my tenancy of the offices. Will you kindly let me know when my tenancy will expire?" The reply dated the 13th of January was: "On referring to your agreement we find that six months' notice must be given to terminate on the 1st of July in any year; you therefore hold the rooms till July, 1893." The court held that a valid notice to quit had been given and accepted and that the tenant was not liable for rent after the 1st of July, 1893: *General Assurance Co. v. Worsley* (1895) 64 L. J. (Q.B.) 253.

The notice should always be given in sufficient time and be correct with reference to the date of the notice: *Cole Eject.* 52.

The notice need not state to whom the possession is to be delivered: *Doe d. Bailey v. Foster* (1846) 3 C. B. 215; but if it does it should state the person correctly: *Doe v. Fairclough* (1817) 6 M. & W. 40.

A mere misdescription of the property in the notice is not fatal if the tenant be not misled by it: *Doe v. —*, (1802) 4 Esp. 185; *Doe v. Wilkinson* (1840) 12 A. & E. 743.

An insufficient notice to quit given by the tenant and assented to by the landlord will not determine the tenancy, nor operate as a surrender on the expiration of such notice: *Johnstone v. Huddlestone* (1825) 4 B. & C. 922; *Doe d. Murrell v. Milward* (1838) 3 M. & W. 328; *Bessell v. Landsberg* (1845) 7 Q. B. 638.

A parol notice to quit is generally sufficient whether given by the lessor or lessee: *Doe d. Macartney (Lord) v. Crick* (1805) 5 Esp. 196; *Bird v. Defonvielle* (1846) 2 C. & K. 415. A notice to quit should, however, be given in writing in order to preserve evidence of the fact. But a good parol notice will not be waived by a subsequent insufficient notice in writing: *Doe d. Macartney v. Crick (supra)*.

#### WHO MAY GIVE AND RECEIVE.

ARTICLE 121.—The notice may be given either by the landlord—or his duly authorized agent in the landlord's name—to the tenant or by the tenant—or his duly authorized agent in the tenant's name—to the landlord.

[Authorities: Cole Ejec. 42.]

#### *The Landlord's Notice.*

The lessor or any person legally entitled to the immediate reversion as assignee, devisee, heir, executor, or administrator of the lessor [see p. 1005, *post*] may give notice to quit, and any subsequent owner deriving title through or under the party giving the notice may avail himself of it: Cole Ejec. 42 and 43; *Doe d. Egremont (Lord) v. Forwood* (1842) 3 Q. B. 627.

The assignee of the reversion was held entitled to the benefit of a provision for termination of the lease: section 5 of the Landlord and Tenant Act [see p. 1090, *post*]

being wide enough to embrace that provision: *Re Rabinovitch & Booth* (1914) 31 O. L. R. 88; 19 D. L. R. 296; 6 O. W. N. 58 [App. Div.].

A mortgagee whose mortgage is subsequent to the commencement of the tenancy is an assignee of the reversion and may give a notice to quit: *Burrowes v. Gradin* (1843) 1 D. & L. 213; 12 L. J. (Q.B.) 333. It would, however, appear that where the mortgage creates a tenancy or redemise for a determinate period, the mortgagor, as the immediate reversioner, should give the notice: *Doe d. Lyster v. Goldwin* (1841) 2 Q. B. 143; *Jarvis v. McCarthy* (1845) 5 N. B. R. 63; *Barrett v. Merchants Bank* (1879) 26 Gr. 409.

A proper notice to quit given to the tenant or his assignee will operate against any subsequent assignee: *Doe d. Castleton v. Samuel* (1805) 5 Esp. 173.

The cases of notices given after sale of demised premises appear at p. 782, *ante*.

A. B. created a lease in favor of C. W. and W. W., brothers and partners in trade, of certain premises in Toronto in which the partnership business was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of A. B. himself or his certain attorney." A notice for the purpose of determining was, during the currency of the lease, served by A. B., which was in ample time, but was served on W. W. only, who signed an admission of service for himself and C. W., who was at the time absent from the Province; but the fact of such service, it was shown, had been communicated to him by his brother, whether within the six months or not did not appear. After the lease A. B. had executed a mortgage on the premises, but he was held entitled to give the notice and that the service was sufficient, notwithstanding also that subsequent thereto, but on the same day, a writ of attachment in insolvency issued against A. B.: *Barrett v. Merchants Bank* (*ante*).

Where S., one of the joint owners of the demised premises, signed a notice to quit, expressed in the singular person, in the name of B., his co-owner, at B.'s

request, but did not sign his own, it was held that—the tenant knowing the facts—the notice was sufficient: *Burrows v. Mickelson* (1904) 14 M. R. 739.

It is not necessary that a notice to quit should be directed to the tenant in possession if proved to have been delivered to him personally at the proper time: *Doe d. Matthewson v. Wrightman* (1801) 4 Esp. 5.

A notice to quit should be given to the immediate tenant or his assignee in whom the term is vested and not to an under-tenant between whom and the person giving the notice there is no privity of estate: *Pleasant d. Hayton v. Benson* (1811) 14 East, 234.

The tenant on being served with the notice should give a similar notice to his under-tenant, and an action to recover possession will lie if the under-tenant holds over: *Roe v. Wiggs* (1806) 2 Bos. & P. (N.R.) 330.

In the absence of proof to the contrary a person who has obtained possession from a tenant will be presumed to be in possession as assignee of the term and not as a mere under-tenant: *Doe d. Morris v. Williams* (1826) 6 B. & C. 41.

In the case of joint lessees a notice to quit given to one of them, even by parol, is sufficient for all: *Doe d. Macartney (Lord) v. Crick* (1805), 5 Esp. 196; *Doe d. Bradford v. Watkins* (1806) 7 East, 551.

### *Service.*

A notice to quit need not be served personally on the tenant if addressed to him. It is sufficient to leave it at his dwelling house with his wife or servant: *Smith v. Clarke* (1840) 9 Dowl. 202; *Jones d. Griffiths v. Marsh* (1791) 4 T. R. 464; *Roe d. Blair v. Street* (1834) 2 A. & E. 329; *Appleton v. Murray* (1860) 8 W. R. 653; *London School Board v. Peters* (1902) 18 T. L. R. 509; 22 C. L. T. 211. Such service is sufficient although the notice does not actually reach the landlord's or tenant's hands before the half year has commenced: *Doe d. Neville v. Dunbar* (1826) Moo. & M. 10; *Papillon v. Brunton* (1860) 5 H. & N. 518; 29 L. J. (Ex.) 265.

Putting the notice under the door of the tenant's house or any other mode of service will be sufficient, if it be shown that the notice came to the tenant's hands before the commencement of the six months: *Alford v. Vickery* (1842) Car. & M. 280.

A notice to quit may be sent by post to the landlord or his agent: *Papillon v. Brunton* (*supra*). But the day of the delivery of the letter is considered as the day on which the notice is served: *R. v. Richmond* (*Recorder*) (1858) E. B. & E. 253.

The service of a notice to quit at the house of the tenant upon a person who under the circumstances is an agent to receive notices will be sufficient though the notice is afterwards burnt and the tenant from imbecility knows nothing about it: *Tanham v. Nicholson* (1872) L. R. 5 H. L. 561.

The statutory provisions noted at pp. 787 and 789, *ante*, should be referred to.

### *The Tenant's Notice.*

A notice to quit given by the tenant should follow the line of the privity of estate and be to his immediate landlord or his assigns, and not, in the case of a sub-lease for example, to the ground landlord or other person through whom the immediate landlord derives his title: *Woods v. Hyde* (1862) 31 L. J. (Ch.) 295; 10 W. R. 339.

So in the case of death or transfer of the reversion, the notice should be to the person or persons for the time being legally entitled to the immediate reversion as heir, executor, administrator, devisee, assignee, or otherwise, or to the attorney or agent of such person or persons: *Woods v. Hyde*; *Doe d. Prior v. Ongley* (1845) 10 C. B. 25; *Papillon v. Brunton* (1860) 5 H. & N. 518; 29 L. J. (Ex.) 265.

### *The Agents.*

The agent ought to have sufficient authority when the notice is given, or at the latest when it begins to operate. A subsequent recognition is not sufficient: *Doe d. Mann v. Walters* (1830) 10 B. & C. 626; *Doe d. Lyster v. Goldwin*

(1841) 2 Q. B. 143; *Doe d. Rhodes v. Robinson* (1837) 3 Bing. N. C. 677.

Where a person has authority to give a notice to quit, it is not essential to the validity of the notice by such agent that his agency should appear on the face of the document itself: *Jones v. Phipps* (1868) L. R. 3 Q. B. 567; 37 L. J. (Q.B.) 198; *Doe d. Lyster v. Goldwin* disapproved of on this point.

The notice should be given in the name of the principal or expressly on his behalf: *Doe d. Lyster v. Goldwin*.

An agent cannot appoint an agent to give notice for him: *Doe d. Rhodes v. Robinson* (*supra*).

A notice signed by one joint tenant (or an agent authorized by one) on behalf of himself and the others (whether authorized by them or not) is sufficient to determine a tenancy from year to year as to all: *Doe d. Aslin v. Summersett* (1830) 1 B. & Ad. 135-140; *Doe d. Kindersley v. Hughes* (1840) 7 M. & W. 139; *Alford v. Vickery* (1842) Car. & M.. 280.

A tenant in common may give a notice to quit his undivided part or share: *Cutting v. Derby* (1776) 2 W. Blac. 1075.

But where tenants in common demise jointly a notice to quit may be given by either of them on behalf of himself and others: Cole Ejec. 44.

A receiver appointed by the Court or by a private individual, with a general authority to let the lands to tenants from year to year, has implied authority to give notices to quit: *Wilkinson v. Colley* (1771) 5 Burr. 2694; *Doe d. Marsack v. Read* (1810) 12 East, 57. But a mere receiver of rents as such has no authority to determine a tenancy: *Doe d. Mann v. Walters*; *Doe d. Rhodes v. Robinson*. Nor has an agent appointed to receive rents and manage the affairs of his principal while the latter is abroad any implied authority to give a notice to quit, but it is a question of fact for the Court or jury whether he had such authority: *Doe d. Mann v. Walters* (*supra*).

One of several executors or administrators is competent to give notice to quit on behalf of all: Cole Ejec. 43.



*Waiver.*

There is this difference between a determination of a tenancy by a notice to quit and a forfeiture: in the former case the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor, in the one case the estate continues though voidable, in the other the tenancy is at an end: *Blyth v. Dennett* (1853) 13 C. B. 178-180; *Dendy v. Nicholl* (1858) 4 C. B. (N.S.) 376-381.

The notice to quit can only be waived by the express or implied consent of both parties.

But if the landlord receive or distrain for rent after the expiration of a notice to quit it is a waiver of the notice: *Goodright d. Charter v. Cordwent* (1795) 6 T. R. 219; *Croft v. Lumley* (1855) 5 E. & B. 648; 6 H. L. Cas. 672. But an acceptance of rent which becomes due before or on the expiration of the notice to quit is not a waiver thereof: *Blyth v. Dennett* (*supra*). Where the money is expressly paid as rent the landlord cannot under protest or otherwise receive it only as compensation for subsequent occupation. Such payment and receipt notwithstanding the protest will waive all forfeitures then known to the landlord: *Croft v. Lumley*, (*supra*).

After a yearly tenancy was determined by notice to quit the tenant continued in possession and tendered rent, which the landlord refused to accept. He told the tenant that he was a trespasser and frequently demanded possession, and it was held that the lessor was entitled to possession under the notice to quit: *Cusack v. Farrell* (1886) 18 L. R. Ir. 494; affirmed 20 L. R. Ir. 56 [C.A.].

Giving a second notice to quit will generally waive one previously given: *Doe d. Brierly v. Palmer* (1812) 16 East, 53; *Doe d. Williams v. Humphreys* (1802) 2 East, 237; *Doe d. Digby v. Steel* (1811) 3 Camp. 115.

If the tenant holds over after notice the landlord cannot waive it and distrain for rent subsequently accruing:

*Jenner v. Clegg* (1832) 1 Moo. & R. 213. But accepting a new tenant will dispense with a notice to quit, though there be no surrender in writing: *Sparrow v. Hawkes* (1796) 2 Esp. 505.

The acceptance of a cheque marked rent to November 1, 1917, is a waiver of a notice to quit and deliver up the demised premises "on the 1st day of August, 1917": *Smith v. Smith* (1919) 52 N. S. R. 196; 40 D. L. R. 509.

In *Smith v. McFarlane* (No. 2) (1903) 5 Terr. L. R. 508, the notice was waived by acceptance of rent, even when paid by a cheque which was not presented for payment.

Where the rent due for one month following the action was paid after action, this was held no bar nor any waiver of the notice to quit, the lessor not intending to prejudice the action when he received the rent: *Laxton v. Rosenberg* (1886) 11 O. R. 199.

### TENANCIES AT WILL.

ARTICLE 122.—A tenancy at will may be determined at any time by either party doing anything inconsistent with the continuance of the "will." The death of either party will determine the tenancy.

#### *Determination by the Landlord.*

The tenancy may be put an end to by the landlord either expressly or by implication from acts or conduct of his inconsistent with its continuance.

#### *Express.*

It is of the very nature of a tenancy at will that the lessor may oust the tenant at what time he pleases, but when not otherwise determined there must be a demand of possession to put an end to a tenancy at will: *Lundy v. Dovey* (1857) 7 U. C. C. P. 38; *Doe d. Jones v. Jones* (1830) 10 B. & C. 718. Anything which amounts to a demand of possession, although not expressed in precise

and formal language, is sufficient to indicate the determination of the landlord's will: *Doe d. Price v. Price* (1832) 9 Bing. 356, at 358. Thus, where the landlord sent to demand the key, telling the tenant at the same time by letter that he was in against his will, it was held that either of these was a sufficient intimation: *Pollen v. Brewer* (1859) 7 C. B. N. S. 371.

The words "unless you pay what you owe me I shall take immediate measures to recover possession of the property," addressed to the tenant of the party entitled to the fee, have been held a sufficient determination of the will, and equivalent to a demand of possession: *Doe d. Price v. Price, supra*.

A. became tenant at will by entering under an agreement for purchase, and made default in his payments. He was then notified that he would be ejected if the payments were not made. He refused to pay, and said he was entitled to a deed in fee simple, and this was held a determination of the will and a disclaimer disentitling him to a demand of possession: *Prince v. Moore* (1864) 14 U. C. C. P. 349.

Where a landlord gave a tenant at will notice to quit and deliver up possession on or before the 23rd of March, it was held that the "will" was expressed by allowing him to remain until then: *Re Grant and Robertson* (1904) 8 O. L. R. 297; 3 O. W. R. 846; 24 C. L. T. 366.

In ejectment, the plaintiff claimed under a deed from the church society, the patentees, habendum to him and his successors, incumbents of the Church of St. John, with a proviso that the land should not be leased without the consent of the churchwardens. The defendant proved that he took possession in 1853, with the assent of the then incumbent V. and of the churchwardens, and that he was to have a lease for sixteen years, and to clear so many acres each year, and to pay taxes; but no lease was ever executed. He had remained ever since, having cleared forty acres and put up buildings. V. was succeeded as incumbent by the plaintiff, and F., a successor of the plaintiff, was incumbent when this action was brought. Neither the plaintiff nor F. had ever recognized

the defendant as tenant, though F. had offered him \$70 to go off quietly, and F. had demanded possession of him, but the plaintiff had not. It was held that the plaintiff might recover as the grantee of the society, and that the demand of possession made by F. would enure to plaintiff's benefit, if any demand were necessary, but the Court inclined to the opinion that it was not: *Henderson v. White* (1873) 23 U. C. C. P. 78.

Where the defendant goes into possession of land as tenant at will under a third party, but upon the invitation and with the concurrence of the plaintiff, he is entitled to a demand of possession before he can be ejected: *McKinnon v. McDonald* (1845) 2 N. S. R. 7.

The lessor, having been seized in fee of the land in question, conveyed in fee to the defendant, and took back a lease for his life at a nominal rent, and the defendant went into possession, and so continued for several years, with the lessor's knowledge, but without his express consent, it was held that he could not be treated as a trespasser and ejected without a demand of possession: *Doe d. Mann v. Keith* (1836) 4 U. C. Q. B., O.S., 86.

### *Implied.*

A determination of the tenancy will be implied from acts of the landlord inconsistent with its continuance.

A mere entry by the true owner upon the lands of which his tenant at will is in possession does not of itself operate to determine the tenancy: see Meredith, C.J., in *McCowan v. Armstrong* (1902) 3 O. L. R. 100, at p. 106.

If the lessor actually enters upon the land though the lessee be not there, and does anything inconsistent with the will, that is a determination of the tenancy; but if the lessor determines the will by words off the land, that does not put an end to the tenancy till the lessee has notice: *Doe d. Davies v. Thomas* (1851) 6 Exch. 854; 20 L. J. (Ex.) 367; *Cliff v. Connaway* (1838) 2 N. B. R. 574. But doing any act upon the land for which, in the case of any other tenancy, he would be liable to an action of trespass: *Turner v. Doe d. Bennett* (1842) 9 M. & W. 643-6,

such as entering on the land without the consent of the tenant, and cutting trees, or getting stone, or putting in his cattle, will determine the will: *Doe d. Bennett v. Turner* (1840) 7 M. & W. 226. So if the lessor enter and cut down and carry away wood from the premises and make surveys thereon without the consent of the tenant, it will operate as a determination of the tenancy: *Lyon v. Slavin* (1846) 5 N. B. R. 258. Where the act is done on the land it is presumed that the tenant is there and knows it, and therefore notice is not required: *Pinhorn v. Souster* (1853) 8 Exch. 763; *Ball v. Cullimore* (1835) 2 C. M. & R. 120. An entry on the land for the purpose of determining the will puts an end to the tenancy: *Woodworth v. Thomas* (1892) 25 N. S. R. 42.

If the lessor dispossess the tenant or turn his cattle into the fields of the tenant at will without consent, or enters on the premises and pulls down a chimney, it will end the tenancy, and the tenant cannot sue the lessor for such acts, though a stranger who did the same would be liable: *Henderson v. Harper* (1844) 1 U. C. R. 481. The reason is that the entry determines the will: *Brewing v. Berryman* (1873) 15 N. B. R. 115.

But the tenancy will not be determined by the lessor's entry, with the lessee's consent, to run a line between the premises demised and the adjoining land: *Botsford v. Tidd*, Stevens' Dig. N. B. 1187; or for the purpose of effecting repairs: *Lynes v. Smith* [1899] 1 Q. B. 486.

An agreement by the lessor for the sale of the freehold to the tenant at will puts an end to the tenancy: *Daniels v. Davison* (1809) 16 Ves. 249; at all events on the conveyance being made, since the tenancy at will would merge in the estate conveyed by the deed: *Cliff v. Conaway* (1838) 2 N. B. R. 574.

If the lessor execute a conveyance, *Nelson v. Cook* (1853) 12 U. C. R. 22; *Clement v. Shriver* (1837) 5 O. S. 310, notice of which reaches the tenant, whether from the assignee of the reversion or otherwise, it will put an end to the tenancy: *Doe d. Davis v. Thomas* (1851) 6 Exch. 854-7; see also *Lennox v. Westney* (1889) 17 O. R. 472; *Wilmot v. Larabee* (1857) 7 U. C. C. P. 407.

If the lessor grants a lease to a third party, such grant operates as a determination of the tenancy at will: *Hogan v. Hand* (1861) 14 Moo. P. C. 310; *semble*, if he gives possession to a new tenant, *Wallis v. Delmar* (1860) 29 L. J. Ex. 276. If such lease be to commence *in futuro*, it will operate as a determination upon its commencement.

#### *Determination by the Tenant.*

The lessee may determine the tenancy by notice of his intention so to do, but only if he actually gives up possession in pursuance of such notice (Co. Litt. 55*b*).

Any act of the tenant inconsistent with his interest, such as an assignment to a third party or an underletting, will also determine the tenancy, provided such act be brought to the notice of the landlord (*Pinhorn v. Souster* (1853) 8 Exch. 763).

But a lease by the tenant may or may not put an end to the will. The principle is that such tenant cannot adversely to his landlord determine his tenancy by transferring his interest to a third party without notice to his landlord. The latter may, by bringing an action against the lessee of the tenant at will, elect to treat the lease as a determination of the tenancy: *Canada P. B. & S. S. v. Byers* (1869) 19 U. C. C. P. 473-6; *Pinhorn v. Souster, supra*; see also *Melling v. Leake* (1855) 16 C. B. 652.

Acts on the part of the tenant, e.g., underletting a portion of the property, which might under ordinary circumstances be held to determine the tenancy, may be treated as impliedly authorized by the character in which, and the circumstances under which, the tenant occupies at will: *Day v. Day* (1871) 3 P. C. 751. See *Keffer v. Keffer* (1877) 27 U. C. C. P. 257.

“To do a forbidden act which actually causes the damage which the prohibition was intended to prevent, is, in my opinion, a wilful act amounting to gross negligence which would render the defendants liable for the consequences. This would amount to voluntary waste, which would terminate the tenancy and make defendants liable

in trespass for damages": *Kokatt v. Melidonis* [1920] 3 W. W. R. 800; 55 D. L. R. 155 [Sask.—C.A.] per Newlands, J.A.

### *Generally.*

A tenancy at will may be put an end to by a notice to quit: *Lennox v. Westney* (1889) 17 O. R. 472; the length of which may be fixed by the contract: *Sarsfield v. Sarsfield* (1862) 22 U. C. R. 59; or, as we have already seen, it may be ended by a demand of possession without notice: *ante*, p. 798. The death of the lessor, in destroying a tenancy at will, obviates the necessity of a formal demand of possession, or a notice to quit, or other act to put an end to the tenancy: *Green v. Higgins* (1873) 1 P. E. I. 466; *Kemp v. Garner* (1843) 1 U. C. R. 39; *Robertson v. Bannerman* (1858) 17 U. C. R. 508; *Sutherland v. Walter* (1840) 3 N. B.R. 141.

If the rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year, but if the lessor determines, he loses the rent. It is conceived that the rent would now be apportionable: under the Apportionment Acts, see p. 322. In *Palmer v. Wallbridge* (1888) 14 A. R. 460; 15 S. C. R. 650, the lessee surrendered, and he was only compelled to pay rent to the quarter-day preceding the surrender, but the Act was not brought to the attention of the Court.

A tenancy at will is generally terminated by the death of either the landlord or tenant: *James v. Dean* (1805) 11 Ves. 383 at 391; *Scobie v. Collins* [1895] 1 Q. B. 375; though Kelly, C. B., in *Morton v. Woods* (1869) L. R. 4 Q. B. 293 at 306, suggests that such a tenancy may continue to subsist after the death of one of the parties, unless the heir or legal representative does something to manifest his intention to determine the tenancy. See *In re Manser, Killick v. Manser* (1910) W. N. 61, where the circumstances were abnormal: *Peters v. McGloyn* (1858) 9 N. B. R. 189.

Outlawry of either party will determine the tenancy: Co. Litt 55 *b.*, as will also attainder of the tenant for

treason: *Denn d. Warren v. Fearnside* (1747) 1 Wils. 176.

### *Statute of Limitations.*

The acquisition of title by a tenant at will is discussed at p. 898, *post*.

## TENANCY AT SUFFERANCE.

ARTICLE 123.—A tenancy at sufferance is determined (1) when the landlord enters into possession—which he may do at any time without notice to quit or demand of possession; (2) when the tenant leaves the premises—which he may do at any time without notice.

[Authorities: Halsbury, 18, p. 438; *Doe d. Bennett v. Turner* (1840) 7 M. & W. 225 at 234].

Many cases go to the extent that where a party makes default after being let into possession, under an agreement to purchase, he may be ejected without notice; and where parties after the expiry of the time for payment in a mortgage or agreement, or after forfeiture in a lease, remain on the premises without being recognized as lawfully in possession, they are tenants at sufferance and not entitled to a demand of possession: *Lundy v. Dovey* (1856) 7 U. C. C. P. 38.

Where a lease contains a covenant by the lessor to grant a renewal if the lessee should request it after the expiration of the term, and the lessee continues in possession without making such request, the case may be treated as the ordinary one of a tenant holding over, and he may be ejected without a demand of possession: *Dewson v. St. Clair* (1856) 14 U. C. R. 97.

If a tenant for years hold over after his term and pay rent, he becomes a tenant from year to year, but until rent is paid and accepted, or some agreement for a new tenancy is made, he is tenant at sufferance only: *Clayton v. Blakey* (1798) 8 T. R. 3.



## TENANCY FOR LIFE.

ARTICLE 124.—A tenancy for life is determined when the life upon which it depends comes to an end.

By the Law and Transfer of Property Act (Ontario), R. S. O. 1914, c. 109, s. 42, the death of a *cestui que vie* will be presumed when he absents himself from Ontario for a period of seven years together. This provision is copied from the Imperial Statute, 18 and 19 Car. II. c. 11, s. 1.

Section 43 of the Ontario Act, copied from s. 4 of the Statute of Charles, saves the right of a tenant for life who has been evicted on the presumed death if the *cestui que vie* is proved to be living, and gives an action for *mésne* profits and interest.

By sections 44 and 45 [copied largely from the Imperial Statute 6 Anne, c. 72 (18 in Ruffhead's edition), ss. 1 and 2], any reversioner may apply to the Court for an order calling upon the tenant to produce the *cestui que vie*, and upon failure to produce the *cestui que vie* he shall be deemed to be dead. If the *cestui que vie* is out of Ontario, the Court may order his production to be viewed by persons appointed by the Court.

The provisions of s. 46 [6 Anne, c. 72 (or c. 18 in Ruffhead's edition), s. 2] and 47 [6 Anne c. 72 [18] s. 3] respectively cover the cases where it appears that the *cestui que vie* was alive and where the *cestui que vie* cannot be produced.

## TENANCY FOR DEFINITE PERIOD.

ARTICLE 125.—A tenancy for a definite period determines by the expiration of the term.

In the case of a tenancy for one year certain, the tenancy expires by effluxion of time, and notice to quit is not necessary to determine it: *Johnston v. Huddlestone* (1825) 4 B. & C. 922, 937; *Cobb v. Stokes* (1807) 8 East, 358, followed: *Salesses v. Harrison* (1911) 10 E. L. R. 544; 41 N. B. R. 103.

“The tenant must give up at the end of the term, unless there be a new lease, whether he has covenanted to do so or not,” per Britton, J., in *City of Toronto v. Ward* (1908) 18 O. L. R. 214, at p. 220 [C.A.].

Where a tenancy is for a time fixed and certain, no notice to quit is necessary; as if the lease be for one year or any number of years or other fixed period or till a particular day: *Right d. Flowers v. Darby* (1786) 1 T. R. 159, 162.

Agreements by which a tenancy for a definite period may be determined before the expiration of the period are dealt with at p. 770, *ante*, where notices to quit, to which the other notices are analogous, are dealt with.

Where a lease with a habendum for one year contained a subsequent clause that either party might terminate it at the end of that year upon giving three months' written notice prior thereto, the clause was struck out as repugnant to the habendum. The lease terminated at the end of the year without any notice: *Weller v. Carnew* (1898) 29 O. R. 400 [MacMahon, J.].

## CHAPTER XIV.

### DELIVERY UP OF PREMISES AND RECOVERY OF POSSESSION.

#### ARTICLE 126.—*Tenant's Duty to Deliver up.*

Encroachments — Emblements and away  
going crops.

#### ARTICLE 127.—*Fixtures.*

The Rules in *Stack v. Eaton*.

#### ARTICLE 128.—*The Tenants' Right to Remove Fixtures.*

Trade fixtures.

Buildings.

Machinery.

Fittings and fixtures.

Agricultural fixtures.

Ornaments.

Mortgaged land.

Manner of severance.

The right is assignable.

Time of severance.

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The covenant to deliver up.

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#### ARTICLE 129.—*Fixtures sold under Hire Purchase Agreement.*

The Common Law.

#### ARTICLE 130.—*The Statutes.*

#### ARTICLE 131.—*Double Rent.*

#### ARTICLE 132.—*Double Value.*

#### ARTICLE 133.—*Use and Occupation.*

#### ARTICLE 134.—*Remedies for Recovery of Possession.*

Entry.

Forcible entry.

Actions for recovery of land.

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ARTICLE 134.—*Remedies for Recovery of Possession—Continued.*

Eviction of overholding tenants by action in Manitoba.

Eviction for non-payment of rent by action in Manitoba.

The Overholding Tenants Act.

Summary proceedings in Manitoba.

When the tenant deserts the premises.

TENANT'S DUTY TO DELIVER UP.

ARTICLE 126.—Unless there be a new lease the tenant must—in the absence of a covenant to deliver up or of any express stipulation—on the expiration or sooner determination of his tenancy, deliver up to his landlord the peaceable and quiet possession of the premises demised to him, together with any encroachments made during the term and all erections, buildings, improvements and fixtures, which he is not entitled to remove; also the growing crops of every description.

[Authorities: *Doe d. Miller v. Tiffany* (1848) 5 U. C. R. 79; *Henderson v. Squire* (1869) L. R. 4 Q. B. 170; 38 L. J. (Q.B.) 73; *Harrison v. Pinkney* (1881) 6 A. R. 225; *Hyatt v. Griffiths* (1851) 17 Q. B. 505; *Newson v. Smythies* (1859) 1 F. & F. 477; 3 H. & N. 840; *City of Toronto v. Ward* (1908) 18 O. L. R. 214 [Britton, J., at p. 220]; 222 [Div. Ct.] 229 [C.A.].

*The Covenant to Deliver Up.*

Where there is an express covenant covering the case it will be given effect to.

Covenants to deliver up in repair are dealt with at p. 645 (*ante*); at p. 859 (*post*), where fixtures are considered, and at p. 1111 *post*, where the Short Forms provisions are considered.

Where fixtures, furniture, or other goods and chattels are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to re-deliver them in the same condition at the end of the term.

A lease may specify what things are to be delivered up, and may contain a covenant for such delivery: *Allardice v. Disten* (1861) 11 U. C. C. P. 278. The object in doing this is to give the lessor a remedy on the covenant, with clear evidence, in case of damage by their being removed or injured during the term.

Sometimes the lessor reserves the power of taking such portions of the land demised as he may want for building or other purposes, upon giving a specified notice to the lessee, and making a proportionable abatement out of the rent. Such a power has been extended to the whole of the land demised: *Doe d. Lady Wilson v. Abel* (1814) 2 M. & S. 541; *Liddy v. Kennedy* (1871) L. R. 5 H. L. 134; and where the proviso was that the lessor might from time to time have any part of the land leased, it was held he might require possession of the whole: *Doe d. Gardner v. Kennard* (1848) 12 Q. B. 244. Where the proviso does not give the lessor power to take possession, it will operate as a covenant merely: *Doe d. Wilson v. Phillips* (1824) 2 Bing. 13. A lease was made of 5 acres, 2 roods and 20 perches of land, at a rent of £100 per year, and the lessor was entitled to resume possession of any portion on giving a certain notice; "the portion or quantity of ground so taken to be valued at £20 per acre, and the rent to be proportionately reduced"; and it was held that the lessor might resume possession of the whole notwithstanding the clause as to diminution of rent, which contemplated only five acres: *Liddy v. Kennedy* (*supra*).

Where, by a written agreement, a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good order, and in the event of loss, damage or breakage, to make good or pay for the same, the amount of such payment, if disputed, to be settled by two valuers; the

settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations: *Babbage v. Coulburn* (1882) 9 Q. B. D. 235; 52 L. J. (Q.B.) 50.

### *The Duty to Deliver Up.*

The rule that at the end of his term a tenant must deliver up absolute possession clear of any claim of his under-tenant, applies where the tenant holds under a parol agreement, without any stipulation that he shall deliver up possession at the end of the term. If, in such case, there is an under-lease, and, at the termination of both tenancies, the under-tenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession and the costs of ejecting the under-tenant: *Henderson v. Squire* (1869) L. R. 4 Q. B. 170; 38 L. J. (Q.B.) 73.

A tenant, whose lease is expired, cannot set up a lease from the landlord to a third party commencing at the expiration of his own lease, but must give up possession according to the terms thereof: *Fox v. Macaulay* (1863) 12 U. C. C. P. 298.

A lessee, when sued by his lessor for not surrendering the premises at the end of the lease pursuant to a covenant therein, cannot set up as a defence the fact that a third person, whose estate is not shown to have been derived from the lessor since the date of the lease, made a surrender of the land to the Crown, and therefore the land does not belong to the lessor: *Russell v. Graham* (1849) 6 U. C. R. 497.

A tenant cannot be allowed to put another in possession, or to connive at his slipping into possession. Where the purchaser of land at sheriff's sale had reason to believe that he could not get possession without legal proceedings against the execution debtor B., he contrived to obtain possession by collusion with B.'s tenant; it was held that he could not rely on the title so acquired, but must abandon the possession obtained through the ten-

ant, and then bring his action of ejectment against B.: *Doe d. Miller v. Tiffany* (1848) 5 U. C. R. 79.

### *The Possession of the Premises.*

If the tenant has let the whole or any part of the premises to an under-tenant, who is in possession at the time of the determination of the term, he must get him out, for otherwise he will not be in a situation to render that complete possession to which the landlord is entitled: *Henderson v. Squire* (1869) L. R. 4 Q. B. 170; 38 L. J. (Q.B.) 73; *Harding v. Crethorn* (1793) 1 Esp. 57; *Ibbs v. Richardson* (1839) 9 A. & E. 849; 1 P. & D. 618; *Christie v. Tancred* (1840) 7 M. & W. 127.

These cases were followed in *Lindsay v. Robertson* (1899) 30 O. R. 229 [Div. Ct.], under the following circumstances: Lessees of premises took them with one room occupied by a person let into possession by the lessor. This sub-tenant paid rent to the lessees during their occupancy, but remained when they went out. It was held that they were liable in an action for use and occupation.

### *Encroachments.*

Encroachments made by a tenant from the adjoining waste, during the term, are *prima facie* for the benefit of the tenant during the term, and afterwards of his landlord, unless it appear by some evidence that the tenant at the time they were made intended them for his own exclusive benefit, and not to hold them as he held the farm to which they were adjacent: *Doe d. Gatehouse v. Rees* (1838) 6 C. & P. 610; *Doe d. Harrison v. Murrell* (1837) 8 C. & P. 135; *Doe d. Lloyd v. Jones* (1846) 15 M. & W. 580; *Kingsmill v. Millard* (1855) 11 Exch. 318.

The tenant is therefore bound to deliver them up at the end of his term.

The landlord may afterwards maintain ejectment to recover possession of them with or without the other premises comprised in the lease: *Andrews v. Hailes* (1853) 2 E. & B. 349; *Doe d. Croft v. Tidbury* (1854) 14

C. B. 304; *Doe d. Dunraven v. Williams* (1836) 7 C. & P. 332.

The covenants to repair, etc., contained in the lease will be held to extend, by implication, to the encroachments and the buildings thereon: *White v. Wakley* (1858) 26 Beav. 177; 28 L. J. (Ch.) 77. A conveyance by a lessee of the encroachments to his son not appearing to have been delivered, and not followed by possession, does not rebut the presumption that the lessee made the encroachments for the benefit of his lessor: *Doe d. Lloyd v. Jones* (1846) 15 M. & W. 580. An endorsement on a lease, by which the lessee agrees to surrender all enclosures made by him at the end of his lease, and to pay 6d. annually as an acknowledgment, is an admission that they were made for the benefit of the lessor: *Doe d. Lloyd v. Jones* (*supra*).

The fact that an encroachment is made with the assent of the landlord does not take it out of the ordinary rule that the property thus enclosed belongs to the landlord at the end of the term. Where the enclosure was of the lessor's own land on verbal consent, it was held that the lessee was not tenant at will so as to make the Statute of Limitations run against the lessor: [see p. 899, *post*]. And it seems that the rule as to encroachments extends alike to the lessor's land and that of a stranger: *Whitmore v. Humphries* (1871) L. R. 7 C. P. 1; 41 L. J. (C.P.) 43.

A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and now claimed to have acquired title from his landlord by possession to the said part, and brought an action of trespass against the present owner of the rest of the said adjoining lot, and it was held that although a tenant taking in land adjacent to his own by encroachment must, as between himself and his landlord, be deemed *prima facie* to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons: *BrUYea v. Rose* (1890) 19 O. R. 433; *Doe d. Baddeley v. Massey* (1851) 17 Q. B. 373.



To raise the presumption that an encroachment on waste land by a tenant was made for the benefit of his landlord, it is not necessary that the land encroached should be contiguous or adjoining to in the sense of conterminous with the land held by him as tenant; it is enough if it be so near thereto that it may be presumed that his position of tenant enabled him to approve. Nor does the circumstance of the intervention of a small river and a fence, and a narrow strip of waste between the holding and the encroachment, rebut the *prima facie* presumption, though there be no direct access between the two across the stream: *Lisburne (Earl of) v. Davies* (1866) L. R. 1 C. P. 259; 35 L. J. (C.P.) 193.

Where the landlord places a tenant in possession of lot No. 1, and the tenant knowingly encroaches on part of lot No. 2, to which the agreement as between himself and his landlord gives him no right whatever, the tenant's occupation will not enure to create a title for the landlord to lot two by means of a twenty-years' possession: *Doe d. Smyth v. Leavens* (1847) 3 U. C. R. 411.

One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession of the land previously occupied, unless he has paid rent or otherwise acted as tenant in respect of it. In the absence of such acts, he can, whilst he remains tenant, acquire as against his landlord a prescriptive title to the land first occupied by him: *Dixon v. Baty* (1866) L. R. 1 Ex. 259; 14 W. R. 836; and see per Anglin, J., in *City of Toronto v. Ward* [18 O. L. R. at p. 223] (*infra*).

As the encroachment is deemed to be for the benefit of the landlord, and to be included in the demise, the landlord cannot, during the term, bring an action against the tenant for trespass on the land thus occupied: *Tabor v. Godfrey* (1895) 64 L. J. (Q.B.) 245.

W. in 1882 went into possession of three lots on Toronto Island under the expectation of obtaining a lease, which was subsequently granted to him for twenty-

one years. At the time of going into possession he took possession of adjoining lands, also the property of the City of Toronto, which he thought formed part of his three lots. In 1891 he allowed F. to occupy the encroached land, as tenant at a yearly rental. W. stated in a receipt given to F. that that part formed part of his leasehold lands. F. paid rent to W. until 1905, when the City, in making a survey, discovered the encroachment. It was held by the Court of Appeal [(1908) 18 O. L. R. 214, 13 O. W. R. 312], affirming a Divisional Court [18 O. L. R. 214, 12 O. W. R. 426], and Britton, J. [18 O. L. R. 214, 11 O. W. R. 653], that W. had acquired no title to the encroached land by possession under the Statute of Limitations. Anglin, J., said [18 O. L. R. p. 222, 12 O. W. R. p. 428]: "It is well established by numerous authorities that in respect of unenclosed land of the landlord adjoining or adjacent to demised premises, upon which the tenant has encroached during the term of his lease, he does not, as against the landlord, acquire title by possession, unless the encroachment is made under circumstances shewing an intention on the part of the tenant to hold the land so encroached on for his own benefit: *Kingsmill v. Millard* (*supra*); *Earl of Lisburne v. Davis* (*supra*); *Whitmore v. Humphries* (*supra*); *Dunraven v. Williams* (*supra*)."

But when the prior possession is taken in contemplation of the lease and with the idea and purpose of occupying the same as part of the premises to be leased, there can be no possession by the tenant otherwise than as tenant, or so that the Statute of Limitations might run in his favour as in *Lord Hastings v. Sadler* (1898) 79 L. T. 355; *City of Toronto v. Ward* (*ante*).

If a tenant takes possession after refusal of his landlord to permit him to do so, that fact rebuts the presumption that the encroachment was for the benefit of the landlord: *Doe d. Baddeley v. Massey* (1851) 17 Q. B. 373; *City of Toronto v. Ward*. Or if he conveys away the encroachment with the knowledge of the landlord: *Kingsmill v. Millard* (1855) 11 Ex. 313; *City of Toronto v. Ward*. But a mere demand after the expiry of the term

sought to be enforced by suit for compensation for use and occupation does not amount to a disclaimer by the landlord that the defendant's occupation has been that of his tenant: *Taber v. Godfrey* (ante).

The assent of the landlord is not material in considering the question of encroachment, and the right of the landlord to delivery up of an accretion to the demised premises upon the expiry of the term: *Whitmore v. Humphries* (ante); *City of Toronto v. Ward* (ante).

### *Erections and Buildings.*

If a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy determines. If the tenant knows his interest he would have no equity to relief. But if he builds in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, it seems the landlord would be compelled to grant a lease: *Ramsden v. Dyson* (1866) L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926; see *Plimmer v. Wellington* (1884) 9 A. C. 699.

### *Emblements and Away-Going Crops.*

#### *Growing Crops.*

When the lease of a farm expires or determines otherwise than by the death of the lessor, the tenant must give up possession of the whole to the landlord, or his assigns, crops and everything else: *Caldecott v. Smythies* (1837) 7 C. & P. 808; *Davies v. Connop* (1814) 1 Price, 53; *Gilmore v. Lockhart* (1843) R. & J. Dig. 2075; 2 E. & E. Dig. 35; *Kaatz v. White* (1869) 19 U. C. C. P. 36; unless there be some stipulation to the contrary in the lease: *Harrison v. Pinkney* (1881) 6 A. R. 225; *St. Germain v. Willan* (1823) 2 B. & C. 216; *Hyatt v. Griffiths* (1851) 17 Q. B. 505; or some custom of the country for the tenant to hold over part of the demised premises, or

to take some of the crops: but *semble*, there is no such custom in this country: *Burrowes v. Cairns* and *Kaatz v. White* (*infra*). If the terms of the lease are inconsistent with the custom, they will exclude it: *Webb v. Plummer* (1819) 2 B. & Ald. 746; *Clarke v. Roystone* (1845) 13 M. & W. 752; *Burrowes v. Cairns* (1846) 2 U. C. R. 288; *Kaatz v. White* (1869) 19 U. C. C. P. 36; 2 E. & E. Dig. 35.

Where an outgoing tenant has no right to an away-going crop, but cuts and carries away the same after the expiration of his term, an action of trover may be maintained against him by the landlord, although the crop was sown during the tenancy, under the idea that the tenant was entitled to take it away: *Davies v. Connop* (*supra*).

A licensee to farm was held in *Gardner v. Staples* (1915) 30 W. L. R. 860; 8 W. W. R. 397; 8 Sask. L. R. 149 [noted at p. 15, *ante*] to be entitled to enter and remove his crop after the lands were sold to a purchaser who took with notice of the license.

#### *When the Tenant is Entitled to the Growing Crops.*

A tenant should be encouraged to cultivate the demised lands and will not do so unless he can be sure of receiving the fruits of his labour. See *Graves v. Weed* (1833) 5 B. & Ad. 105; Litt. s. 63; Co. Litt. 55a, 56a.

Therefore the right to *emblements* is given by law in certain cases to the tenant of an estate of *uncertain duration*, which has unexpectedly determined without any fault of such tenant, to take the crops growing upon the land when his estate determines.

Emblements are the corn or other growth of the earth, which are produced annually, not spontaneously, but by labour and industry, and hence are called *fructus industriales*.

Emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed. Indian corn, wheat, rye, oats, buckwheat, potatoes, hemp,

Hungarian grass, flax, and millet, are emblements. They are annual products, and, when cut, the root dies. But growing grass, even if produced from seed, and ready to be cut for hay, is not emblements, because it does not mature the first year, and the improvement is not distinguished from the natural product, although it be increased by cultivation: *Graves v. Weed* (*supra*); *Haines v. Welch* (1868) L. R. 4 C. P. 91; *Atkinson v. Farrell* (1912) 27 O. L. R. 204 [Div. Ct.], the case of a wheat crop.

Manure piles and straw stacks are dealt with at p. 846, *post*.

The claim to emblements amounts only to a legal right to enter for the purpose of reaping and taking away the crops, and not to a right to maintain trespass against the owner, or any one claiming under him: *Nelson v. Cook* (1853) 12 U. C. R. 22.

Where there is a right to emblements, ingress, egress and regress are allowed by law, to enable the party to enter, cut and carry them away, and also to remove his other property after the estate is determined: Co. Lit. 56a.

Where, by the custom of the country—though probably no such custom could be established in Canada—or by the terms of the lease, the tenant has a right to retain possession of any part of the demised premises after the end of the term, *ex. gr.*, a right to retain the barns for the purpose of threshing out his crops, etc., such right will in effect operate as a prolongation of the term as to such part; and therefore during that period the landlord may distrain thereon: *Beavan v. Delahay* (1788) 1 H. Blac. 5; *Knight v. Bennett* (1826) 3 Bing. 361.

Or the outgoing tenant, or his assignees, may maintain trespass: *Beaty v. Gibbons* (1812) 16 East, 116; or defend an action of trespass at the suit of the incoming tenant: *Griffiths v. Puleston* (1844) 13 M. & W. 358; or defend an action of ejectment at the suit of the landlord; but he should confine his defence by notice to the particu-

lar part: *Alcock v. Wilshaw* (1860) 2 E. & E. 633; 29 L. J. (Q.B.) 143; and during such period the out-going tenant cannot remove any of the straw, etc., which he has covenanted not to remove "during the leased term": *St. Germain's v. Willan* (1823) 2 B. & C. 216. So, where there is a right reserved to the tenant to take the away-going crop, it operates as a prolongation of the term in which such crop grows, and the possession of the land continues in the tenant till the crop is or might be cut and carried away: *Boraston v. Green* (1812) 16 East, 71.

Where there is a right to take emblements, they belong either to the tenant himself, whose estate is determined in such a manner as to give him the right; to his grantee or devisee, where he has granted or devised them; or to his personal representatives, where the right arises upon the death of a tenant who has made no disposition respecting them: 1 Steph. Com. (11th ed.) 259, 287; 2 Id. 228.

The right to emblements does not give a title to the exclusive occupation of the land; therefore it seems that if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land: 1 Wms. Exors. (9th ed.) 632.

Where the landlord's executors sold wheat planted by a tenant for life to which the tenant was entitled as "emblements," it was held that the tenant might recover in an action for conversion: *Atkinson v. Farrell* (1912) 27 O. L. R. 204 [Div. Ct.].

#### *The Estate Must be of Uncertain Duration.*

The uncertainty may be the death of the lessor, who is tenant for life, or may arise from notice given by the lessor, after the crops are sown, in the case of a tenancy determinable on notice: *Campbell v. Baxter* (1865) 15 U. C. C. P. 42.

Those only are entitled to emblements who have an uncertain estate or interest in land, which is determined either by the act of God or of the law between the period of sowing and the severance of the crop: Shep. Touch. 244, n.

Tenants from year to year are not generally entitled to emblements, except where their tenancy is determined by the death of their landlord or the happening of some other uncertain event over which they have no control: *Kingsbury v. Collins* (1827) 4 Bing. 202.

A strict tenant at will is entitled to emblements where his estate is determined either by his own death or by the act of the landlord, as in the case of a conveyance by the latter: *Nelson v. Cook* (1853) 12 U. C. R. 22; but not to cases where the tenant has himself determined the will: Lit. s. 68; Co. Lit. 55.

When a tenancy at will is terminated by the lessor, or by the death of either party, the tenant or his legal representative is entitled to the emblements: *Nelson v. Cook* (1853) 12 U. C. R. 22; *Bloomfield v. Hellyer* (1895) 22 A. R. 236.

Tenants at sufferance are not entitled to emblements: see *Bloomfield v. Hellyer* (1895) 22 A. R. 232.

Tenants for life, whether for their own lives or *pur autrre vie*, are strictly within the rule applicable to persons entitled to emblements; and therefore, neither they nor their representatives shall be prejudiced by the sudden determination of the estate by the death of the party for whose life it is held, because such a determination is contingent and uncertain: Co. Lit. 55 *b*; *Atkinson v. Farrell* (1912); 27 O. L. R. 204 [Div. Ct.].

A tenant, holding under a lease *pur autrre vie*, is entitled to the crops sown before the death of the *cestui que vie*, but not to those sown afterwards, though ignorant of the death; nor is he entitled to emblements if he forfeit the lease, for then the landlord is in as of his former estate by the tenant's own act: *Kelly v. Webber* (1860) 11 Ir. C. L. R. 57.

The same rule applies to the under-tenants, or lessees of tenants for life: *supra*. They have not only the same privileges respecting emblements, but in some instances greater; for in those cases where the tenant for life is not entitled to emblements because the estate was determined by his own act, it does not prejudice his under-tenant, who is not answerable for it, and he has, there-

fore, a right to emblements: *Knevett v. Poole* (1593) Cro. Eliz. 463.

*Where the Estate is of Certain Duration.*

A usage under which an outgoing tenant may take away the crop sown during the last year of his tenancy, but not ripe until after the expiration of it, has been held in England to be reasonable and valid, and to apply equally to tenants by oral agreement, or by writing, or even by deed: *Wigglesworth v. Dallison* (1779) 1 Doug. 201.

But it would seem that there is no custom of the country as to such crops in Ontario, or probably in any other province. A custom which is to prevail over the general principle of law with regard to emblements must be what is, legally speaking, a custom by prescription: *Burrowes v. Cairns* (1845) 2 U. C. R. 288; 2 E. & E. Dig. 35.

Where there is a stipulation in a lease for a term certain, that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right to the away-going crop is excluded: *Burrowes v. Cairns* (*supra*).

Such an agreement will be liberally construed. A lease provided that if D. (the lessor) sold the farm the lessee should give up possession upon receiving six months' notice before the 1st of April, and that he should have the privilege of harvesting and threshing the crops of the summer-fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the lessee received the stipulated notice, after he had prepared the summer-fallow; but before he had sown it. He afterwards sowed it with fall wheat, and gave up possession on the 1st of April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use. It was held that under the terms of the lease the lessee was to have the privilege of harvesting any crops which might have been put in on the summer-



fallow, unless D. elected to pay for them at a valuation, and that he had never parted with the property in the crop, and was entitled to recover in trover: *Harrison v. Pinkney* (1880) 6 A. R. 225; 2 E. & E. Dig. 38.

In trover for an away-going crop, which a lessee contended he was entitled to under a covenant in his lease, "that he should not sow fall grain in all fields now cleared, in the first or last year of the lease"; on proving that he had not sown the grain in all the fields, the Court held that the word "all" must be construed "any"; that the lease, therefore, did not militate against the common law rule, and that the lessee was precluded from claiming the away-going crop: *Gilmore v. Lockhart* (1843) R. & J. Dig. 2075; H. T. 6 Vict.; 2 E. & E. Dig. 35.

The lessee, by deed of certain land for five years from the 1st October, 1862, agreed to give up possession on the expiration of the term created. On the lease was indorsed an unsigned memorandum, to the effect that if the lessee cleared any more land than was then cleared, he was to have the same rent free for the first three years for clearing and fencing the same. No land was cleared by the lessee until the fall of 1865, and in the fall of 1867 he put in a crop of wheat. After the expiration of his term he asked permission from S. (the lessor) to remain on the premises until the latter wanted them, and in the following April he left of his own accord, giving up to S. the place with all that was on it. In June following, S., by deed, leased the land and crops thereon to two of the defendants for five years from the 7th of January previously, and subsequently to this, when the wheat had ripened, the lessee entered upon the land then in defendants' possession under S., and cut the crop. Defendants took possession of the wheat, and the lessee brought trover. It was held that the memorandum, not being by deed, could not operate as a lease for three years, because it was intended to commence from a future time; and taking it as part of the lease, it must be construed as co-extensive only with the lease, and ending on the 1st October, 1867. But the surrender to S. in April, 1868, vested the crop in him, and his right passed

to the defendants. If taken apart from the lease, the memorandum could not, in 1862, pass the property in wheat not grown until 1868; nor could it have any effect as a license, unless by deed; but even if a license, it was revoked by the lease from S. to the defendants, and the lessee, independently of the lease and memorandum, had no right to the wheat as an away-going crop: *Kaatz v. White* (1869) 19 U. C. C. P. 36; 2 E. & E. Dig. 35.

Where the lease prevents the tenant from taking the away-going crop, as in *Burrowes v. Cairns* (*supra*), the tenant will not be in a different position by holding over after the expiration of his term, without coming to any fresh agreement with his landlord, for he will be taken to hold under the same terms: *Boraston v. Green* (1812) 16 East, 71.

A three-years' lease contained these words: "also to allow the said (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop, when they get possession." It appeared that when the tenants got possession, there was a fall crop sown by the preceding tenant, which he was entitled to reap. It was held that the tenants were entitled to sow a crop during the tenancy, which they might reap afterwards, and that they had a right to dispose of such crop to third persons: *Campbell v. Buchanan* (1857) 7 U. C. C. P. 179; 2 E. & E. Dig. 36.

#### *Termination by Tenant's Own Act.*

If the estate, although uncertain and contingent in its nature, be determined by the tenant's own act, as by forfeiture of tenant for life, for waste committed, or by marriage of a female tenant who held during widowhood — the principle of the rule does not apply, and there shall be no emblements: *Oland's Case* (1604) 5 Co. R. 116; *Bulwer v. Bulwer* (1819) 2 B. & Ald. 470.

So a tenant is not entitled to emblements as against a lessor who enters for a condition broken, or one who enters by title paramount: *Nicholas v. Simonds* (1625) 2 Roll. R. 468; *Davis v. Eyton* (1830) 7 Bing. 154; *Campbell v. Baxter* (1865) 15 U. C. C. P. 49; *Kelly v. Webber* (1860) 11 Ir. C. L. R. 57.

And where a lease was made on condition that if the lessee contracted a debt on which he should be sued to judgment, which should be followed by execution, the lessor should re-enter, it was held, that the lessor having done so, was entitled to the emblements: *Davis v. Eyton* (1830) 7 Bing. 154.

## FIXTURES.

ARTICLE 127.—All personal chattels when physically affixed to the freehold by some person having an interest in the soil, become, as “fixtures,” a part of the realty itself and therefore may not be removed by tenants from the freehold without the owner’s consent unless they come within the provisions of the following article.

The general rule of law respecting fixtures is, that whatever is fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself; the maxim being *quicquid solo plantatur, solo cedit*: Broom Max. (6th ed.) 376; *Minshall v. Lloyd* (1837) 2 M. & M. 459; *Elliott v. Bishop* (1854) 10 Exch. 507 (Martin, B.); a maxim, however, which has been much relaxed since the days of the Year Books: *Gough v. Wood* [1894] 1 Q. B. 719.

*Quicquid plantatur solo, solo cedit*: “Whatsoever is affixed to the soil belongs to the soil.” This maxim expressed the common law as to fixtures—that is things of an accessory character which upon being annexed to the lands or buildings became by such annexation part of the very freehold.

As soon as a tenant or occupant of lands annexed chattels to the soil the law considered him to have abandoned all right to them and the subsequent removal of such chattels would be the commission of waste on the part of the tenant: 18 Hals. s. 417 note (g).

The first question to be considered is: “What chattels brought on to the demised premises become fixtures—that is, part of the freehold?”

The second is: "When may a chattel which has ceased to be a chattel by becoming a fixture be restored to its original condition by being severed and removed?"

The first of these questions will be discussed under this Article: the second under Article 128 following.

The word "fixtures" has been used in so many senses in text books and judicial decisions that it was only recently that a clear exposition of the principles of the law of fixtures was possible.

Of comparatively recent years the confusion of cases has been reduced to some order, and in 1902 Sir William Meredith, then C.J.C.P., now C.J.O., giving judgment in a case of *Stack v. Eaton* (1902) 4 O. L. R. 335 [Div. Ct.] at p. 338; 1 O. W. R. 511; 27 Occ. N. 322, crystallised the innumerable decisions into five rules, which relate to fixtures generally and include the rules governing the questions arising between landlord and tenant.

He said, at p. 338: "These propositions are the result of the decisions in *Bain v. Brand* (1876) 1 A. C. 762, 772; *Holland v. Hodgson* (1872) L. R. 7 C. P. 328, and *Hobson v. Gorringe* [1897] 1 Ch. 182; 66 L. J. (Ch.) 114 [discussed at p. 870, *post*], and are in accordance with the view of the Supreme Court of Canada in *Haggert v. Town of Brampton* (1897) 28 S. C. R. 174 [Ont.—Appeal], which was decided in the same month as *Hobson v. Gorringe*, though a few days before the judgment in that case was delivered."

*The Rules in Stack v. T. Eaton Co. Ltd.*

[I.] That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as show that they were intended to be part of the land.

[II.] That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to show that they were intended to continue chattels.

[III.] That the circumstances necessary to be shown to alter the *prima facie* character of the articles are cir-

cumstances which show the degree of annexation and object of such annexation, which are patent to all to see.

[IV.] That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

[V.] That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

The rules have been adopted and applied in the Canadian Courts, *e.g.*, Gregory, J., in *Dominion Trust Co. v. Mutual Life Assurance Co.* [1917] 3 W. W. R. 941 [B.C.], and see *Devine v. Callery* (1917) 40 O. L. R. 505, and will be considered *seriatim*.

#### *Rule I. in Stack v. Eaton.*

*That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as show that they were intended to be part of the land.*

#### *The Onus of Proof.*

In cases coming under this Rule the onus of showing that the articles are intended to be part of the land lies on those who assert they have ceased to be chattels: *Holland v. Hodgson* (1872) L. R. 7 C. P. 328, 41 L. J. (C.P.) 146 [Blackburn, J.]; *Dominion Trust Co. v. Mutual Life Assurance Co.* [1917] 3 W. W. R. 941 [B.C.—Gregory, J.].

Sometimes machinery and other articles, and even buildings, may be so erected as not to be let into the soil, or annexed to it or to any building in such a manner as to become part of the freehold, or to lose their chattel character. Barns, granaries, sheds or mills erected upon blocks, rollers, pattens, pillars or plates, resting on

brickwork, but not affixed to the freehold by being let into it, or united to it by mortar, nails or otherwise, are not considered as fixtures, but only as chattels, and may be removed by a tenant during his term, notwithstanding they have sunk into the ground by their own weight: *Huntley v. Russell* (1849) 13 Q. B. 572. A wooden windmill resting by its weight on a brick foundation does not constitute part of the freehold: *R. v. Otley* (1830) 1 B. & Ad. 161. So a wooden barn erected by a tenant on a foundation of brick and stone let into the ground, but the barn resting upon it by weight alone, is a mere chattel removable by the tenant on the expiration of his term, and for which he may afterwards maintain trover: *Wansbrough v. Maton* (1836) 4 A. & E. 884. So with respect to a wooden stable standing upon blocks and rollers, or a shed standing upon brickwork let into the ground: *Fitzherbert v. Shaw* (1789) 1 H. Blac. 258. A rector erected in the garden of the rectory apart from the rectory house, hothouses about seventy feet long, and between ten and twenty feet high. They consisted of a frame and glasswork, resting on brick walls about two feet high, and embedded in mortar on these walls, and it was held that he or his executors, in a reasonable time after his death, were entitled to remove them without incurring any liability as for either dilapidations or waste: *Martin v. Roe* (1857) 7 E. & B. 237.

One M. was lessee of a certain lot of land for 25 years for the purpose of boring for oil, salt or minerals, with right of ingress and egress in a certain designated manner. A steam engine belonging to plaintiffs was placed by them upon the land for the purpose of drilling the rock and experimenting for oil. It rested on sills let into the ground, and was fastened to the sills by bolts and spikes. It was similar to others which it appeared were movable, and were used on the surface for the purpose of sinking shafts to test whether or not there was oil there. It was held that the engine was not a fixture, for the boring for oil was a temporary proceeding, and machinery used for that purpose could not be said to have been placed there for the permanent benefit of the

inheritance, nor to be trade fixtures, for no trade was carried on, and the engine was annexed to the soil merely to steady it: *Burnside v. Marcus* (1867) 17 U. C. C. P. 430.

A tenant at will during the existence of his tenancy cannot remove a greenhouse conservatory and hothouse affixed to the freehold; but boilers and machinery for heating these houses, which rest by their own weight on bricks, and are not fastened to the freehold, are removable, as also the pipes passing from the boilers through a brick wall into an adjoining building: *Gardiner v. Parker* (1871) 18 Gr. 26.

The vat of a cream separator standing alone was held not to be a fixture: *Assiniboia Land Co. Ltd. v. Acres et al.* (1915) 32 W. L. R. 580; 9 W. W. R. 369 [Sask.—Elwood, J.].

In *Dominion Trust Co. v. Mutual Life Assurance Co.*; *British Canadian Securities v. Mutual Life Assurance Co.* [1917] 3 W. W. R. 941; [B.C.—Gregory, J.], safe deposit boxes in a cement vault were held to be or not to be part of the realty according to the manner of instalment. A steel book case and a map-and-voucher case standing by their own weight were held to be chattels. Steel shelving and a wire partition in the safety deposit vault were held to be part of the realty; one armature already fitted as a spare part to an elevator was held to go with the realty; another armature not yet used was held to be a chattel; plate-glass covers of fixed counters were held to go with the realty. This decision was affirmed [1918] 3 W. W. R. 415 [C.A.].

A water tank not attached to the freehold was held to be a chattel: *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 11 W. L. R. 520; 29 C. L. T. 1177; 2 E. & E. Dig. 49 [Sask.—Lamont, J.].

#### *Rule II. in Stack v. Eaton.*

*That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to show that they were intended to continue chattels.*

Adopted in *D'Augigney & Brunswick-Balke Collender Co.* [1917] 1 W. W. R. 1331 [Alta.—Walsh, J.].

*The Onus of Proof.*

In cases coming under this Rule the onus of showing that the articles are not part of the land lies upon those who contend that they are still chattels: *Holland v. Hodgson* (1872) L. R. 7 C. P. 328, 41 L. J. (C.P.) 146 (Blackburn, J.), followed in *Bing Kee v. Yick Chong* (1916) 43 S. C. R. 334 [B.C. appeal]; *Blanshard v. Bishop* (1911) 2 O. W. N. 996 [Latchford, J.], and *Dominion Trust Co. v. Mutual Life Assurance Co.* [1917] 3 W. W. R. 941 [B. C.—Gregory, J.]; *Cronkhite v. Imperial Bank of Canada* (1906) 14 O. L. R. 271; [Anglin, J. (at p. 276), Div. Ct.].

In *Credit Foncier Franco-Canadien v. Lindsay Walker Limited* [1919] 2 W. W. R. 385, 12 Sask. L. R. 335, Taylor, J., held that an advertising hoarding, the posts of which were driven four feet into the ground and were stayed by boards attached to anchors sunk into the ground three feet, became physically part of the soil. He said, at p. 387: "Were it not for the decision in *Provincial Bill-Posting Co. v. Low Moor Iron Co.* [1909] 2 K. B. 344, 78 L.J. (K.B.) 702, I would have hesitated to hold that this structure was a fixture and became part of the realty. In that case, Bigham, J., held that a hoarding erected for the same purpose as the one in this action and in practically the same manner was not a fixture. He was of the opinion that they were fixed to the ground for the purpose of being upright, but that is all, and there was never any intention that they should form part of the freehold. I might add that this special hoarding would plainly appear from the nature of the property and the degree of annexation to be erected only to serve a temporary purpose. The lots in question are vacant lots, situate in that portion in Regina into which it was expected that business conditions would develop. When and how soon the property would be in demand for business purposes was, at the time the hoarding was



erected, purely speculative, but it now appears that the plaintiff company have, since they obtained title, sold the property at a figure which shows that it is apparently in demand for business purposes. And I would have been of the opinion that the very nature and purpose of the structure would indicate that it is only a temporary and not a permanent use of the property. However, the Appellate Division consisting of Buckley, L.J., Kennedy, L.J., and Joyce, J., in *Provincial Bill-Posting Co. v. Low Moor Iron Co.* (*supra*) reversed the decision of Bigham, J., and unanimously held that an advertising board, practically, as I have stated, in the same manner as the one in question in this action, was a fixture, and so fixed as to become physically part of the soil." His decision was affirmed by the Court of Appeal [1919] 2 W. W. R. 925.

Where the tenant removing a frame house dug and chopped around it, Rose, J., assumed that it was annexed to the realty in *Devine v. Callery* (1917) 40 O. L. R. 505; but see per Meredith, C.J.C.P., and Riddell, J., in the same case. See also *Thistlethwaite v. Sharp* (1912) 1 W. W. R. 946 [Sask.—Maclean, D.C.J.].

Bar fixtures, counter, back bar, mirror, coil boxes and electric light fixtures: the counter held to the floor by angle irons, the top screwed to the counter and the bottom to wooden plugs let into the concrete floor; the back fixture standing of its own weight on the floor, but held close to the wall by wires run from its back to nails driven in the wall for that purpose; all these were held to become part of the freehold: *D'Auginey v. Brunswick-Balke Collender Co.* [1917] 3 W. W. R. 1331, Walsh, J., applying the dictum of King, J., in *Haggert v. Town of Brampton* (1879) 28 S. C. R. 174 at p. 182, to the effect that "if the object of setting up the articles is to enhance the value of the premises or to improve its usefulness for the purposes for which it was used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and shewing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as

to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagee and mortgagor."

An emulser in a boiler room fastened to the building by bolts embedded in a cement floor; a 5 h.p. phase motor fastened by coach screws to a frame bracket nailed to a wall, the supports of the bracket being embedded in the cement floor, a cream separator with a vat and an ice chopper fastened in the same way as the emulser, were, with the exception of the vat, held to have become part of the freehold: *Assiniboia Land Co. v. Acres et al.* (1916) 32 W. L. R. 580; 9 W. W. R. 369; [Sask.—Elwood, J.] following *Stack v. Eaton*.

The following articles were held to be part of the realty: A gas machine, attachment and fittings, bath and fittings and hot water apparatus: *Dundas v. Osment* (1906) 4 W. L. R. 116 [Newlands, J.] 7 Terr. L. R. 342; 6 W. L. R. 86 [Full Ct.]; hot water heating apparatus—probably—dictum of Townshend, J., in *Cullen v. McPherson* (1900) 40 N. S. R. 241; coal weigh-scales fastened by bolts to a coal-wharf, with a scale-house built over part so that it would have to be taken apart to remove the scale: *Handrahan v. Buntain* (1913) 15 D. L. R. 117 (P.E.I.)—[Fitzgerald, J.]; a fence, windmill and shed: *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 11 W. L. R. 520; 29 C. L. T. 1177 [Sask.—Lamont, J.] 2 E. & E. Dig. 49.

In some cases the very nature of the articles shows that they are only fastened as chattels temporarily. Thus, in the case of a carpet tacked to the floor for the purpose of keeping it stretched, it would be absurd to call that a fixture, which is easily removable, and as a matter of fact repeatedly removed: *Holland v. Hodgson* (1872) L. R. 7 C. P. 335.

The same remark applies to mirrors or pictures attached by screws or nails in the ordinary way to the walls of a house: *Birch v. Dawson* (1834) 2 A. & E. 37; *Climie v. Wood* (1869) L. R. 4 Ex. 329; also to bookcases fastened to the walls by screws or nails: *Birch v. Dawson*, *supra*. So too a clock, though firmly fixed to the walls of

a room, may remain a chattel: *Parsons v. Hind* (1866) 14 W. R. 860.

Rubber stair-pads, tacked to hold them in place: (*Dundas v. Osment*) were held to remain chattels: (1906) 4 W. L. R. 116 [Newlands, J.] 7 Terr. L. R. 342; 6 W. L. R. 86 [Ct. en B.]; as was a bicycle shed: *Butterworth v. Ketchum* (1904) 3 O. W. R. 844 [MacMahon, J.].

Tapestries in the hall of a mansion house, hung like heavy pictures or mirrors and easily removable were held still to be chattels, but tapestries in the drawing-room forming an essential part of the permanent decoration were annexed to the freehold and passed with it: *Re De Falbe, Ward v. Taylor* (1901) 17 T. L. R. 90; 21 C. L. T. 25; 55 [Byrne, J.]; but this was reversed in [1901] 1 Ch. 523; 17 T. L. R. 246; 21 C. L. T. 193 [C.A.]; and the judgment of the Court of Appeal affirmed by the House of Lords [1902] A. C. 157; 71 L. J. (Ch.) 772; 22 C. L. T. 136; 18 T. L. R. 293, *sub nom. Leigh v. Taylor*.

Cotton spinning machines called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead, merely to steady them for more convenient use as machines, continue to be chattels and as such are distrainable for rent: *Hellawell v. Eastwood* (1851) 6 Exch. 295, 312.

Gaseliers affixed to gas pipes by means of screws, though easily removable without injury to the freehold, will pass under a lease of the house with all the fixtures on the premises: *Sewell v. Angerstein* (1868) 18 L. T. 300.

Where an article is so firmly attached to the land that its removal necessarily involves its destruction, it has lost its character as a chattel and has become a part of that to which it is affixed; as, for instance, paper pasted on the walls of a room: *D'Eyncourt v. Gregory* (1866) L. R. 3 Eq. 382, 390; see also *Parsons v. Hind* (1866) 14 W. R. 860; *Whitehead v. Bennett* (1858) 27 L. J. (Ch.) 474.

*Rule III. in Stack v. Eaton.*

*That the circumstances necessary to be shown to alter the prima facie character of the articles are circumstances which show the degree of annexation and object of such annexation, which are patent to all to see.*

This rule is adopted by Walsh, J., in *D'Augigney v. Brunswick-Balke Collender Co.* [1917] 3 W. W. R. 1331, at p. 1334, where he holds that the fact that affixed articles are sold under a hire-purchase agreement (as to which see p. 870, *post*), cannot be regarded as a "circumstance" within the meaning of this Rule.

In *Blanshard v. Bishop* (1911) 2 O. W. N. 996, 10 O. W. R. 28, Latchford J., having found as a fact that the intention of both parties was that a building resting on land by its own weight was to be chattel, held that such intention was a circumstance making it so.

In holding that certain articles of a long list had and others had not become affixed to the freehold, Clement, J., said in *Royal Bank of Canada v. Coughlan* [1919] 2 W. W. R. 382 [B.C.], at page 384: "In coming to the conclusion I have above indicated, I have largely followed my own judgment in *Kilpatrick v. Stone* (1909) 15 B. C. R. 158, 13 W. L. R. 634, from which I see no reason to depart. In addition to the cases there cited on the main question, I may quote the language of King, J., in delivering the judgment of the Court in *Haggert v. Brampton* (1897) 28 S. C. R. 174, at p. 182.

"I need not, I think, enlarge upon the reasons for my finding in favour of the defendant [mortgagor] as to certain articles. The evidence, in my opinion, shows that they were placed upon the mortgaged premises under such circumstances and with such a slight or temporary or occasional annexation to the freehold as to rebut any presumption of intention on the part of the mortgagors to make them part of the land."

In *Dominion Trust Co. v. Mutual Life Assurance Co.* [1918] 3 W. W. R. 415, Macdonald, C.J.A., said, at p. 418:

“It appears to be well established by authority that if an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold, notwithstanding that they are not affixed otherwise than by their own weight to the freehold: *Holland v. Hodgson* (1872) L. R. 7 C. P. 328; 41 L. J. C. P. 146, in which Lord Blackburn points out that in such circumstances the onus of proof lies on the party who alleged that the chattel has been made part of the realty. In *Leigh v. Taylor* [1902] A. C. 157, at p. 158; 71 L. J. (Ch.) 272, Lord Macnaghten said that ‘the mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder and simpler times.’ ”

Whether a machine or any other article has been so fixed and attached to the freehold as to become parcel of it, is a question of fact depending on the circumstances of each case, and principally on two circumstances; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causa*, or in that of the Year Book, *pur un profit del inheritance*: 20 Hen. VII. c. 13; or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. If machines be attached slightly, by screws or otherwise, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, they do not become “fixtures” or part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures and other matters of

an ornamental nature, which have been slightly attached to the walls of the dwelling-house as furniture, and which is probably the reason why they and similar articles have been held in different cases to be removable: *Hellawell v. Eastwood* (1851) 6 Exch. 295; 20 L. J. Ex. 154. This case has been criticised in *Haggert v. Town of Brampton* (1879) 28 S. C. R. 174, and see *Assiniboia Land Co. v. Acres* (1915) 9 W. W. R. 368 [Sask.—Elwood, J.].

But the presumption that that which is annexed to the soil becomes part of the soil may be rebutted by circumstances showing the intention of the parties to the contrary: *Lancaster v. Eve* (1859) 5 C. B. N. S. 717; 28 L. J. (C. P.) 235. Thus, where a chattel has been annexed by its owner to another's freehold, and may without injury be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether in a particular case it has become so or not is a question of evidence: *Wood v. Hewett* (1846) 8 Q. B. 913; *Lancaster v. Eve* (*supra*).

These cases were considered by Anglin, J. [p. 276] and Britton, J. [p. 280] in *Cronkhite v. Imperial Bank of Canada* (1907) 14 O. L. R. 271, which is discussed at length at p. 1113, *post*, and the former held the vault door there described to be a fixture—although a trade fixture, while the latter—giving the judgment of a Divisional Court—seemed to incline to the opinion that it was and had ceased to be a chattel.

A wardrobe, dressing table and washstand joined together and fastened by screws to battens nailed to the wall of a dressing room in a dwelling house, a large looking glass fixed by nails and screws to the walls of a drawing room and certain very heavy dog grates substituted for fixed grates which were in the house at the time the mortgage was given, were held to be part of the freehold as against the mortgagee. It was held that the intention of the mortgagor was to improve the house as a house by adding the articles in question and not merely to use them as pieces of furniture and that this

was the deciding test: *Monti v. Barnes* [1901] 1 K. B. 205 [C.A.], 17 T. L. R. 88; 21 C. L. T. 25, 55.

*Rule IV in Stack v. Eaton.*

*That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.*

*Rule V in Stack v. Eaton.*

*That, even in the case of tenant's fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.*

## TENANT'S RIGHT TO REMOVE FIXTURES.

ARTICLE 128. — Fixtures of a chattel nature erected by a tenant upon the leased premises for the purposes of ornament, domestic convenience or carrying on a trade, become part of the freehold but may be severed [whereupon they cease to be "fixtures" and become chattels again], and removed by the tenant or his assigns, provided that that can be done without serious injury to the freehold: they must be removed before the expiration of the tenancy but by agreement the time for removal may be extended.

The question to be considered under this Article is: "When may a chattel which has ceased to be a chattel by becoming a fixture be restored to its original condition by being severed and removed?" see p. 823, *ante*.

In the early period of English history the maxim *quicquid plantatur solo, solo cedit*, was applied in its

most comprehensive sense. The relation of landlord and tenant, as conceived at the present day, was unknown to the feudal system, and foreign to its basic principles. The original rule of the common law subjected everything affixed to the freehold to the law governing the freehold (2 Kent, Commentaries, 343). The tie between the lord and his villein was not constituted by contract, since the villein had no rights of property. He was merely a servant or bailiff of the owner of the soil, and by a strict application of the above maxim anything erected upon or placed in the soil by him at once became part and parcel of the soil, and he had no right to remove it again, even during his term. As the status of the villein gradually became more defined, and the crude formularies of the feudal tenures of land broadened, the relation of villein and lord approximated more to the relationship of landlord and tenant, as we know it, and the modern idea of certain property rights in the tenant slowly emerged, but the earliest reported case on the subject of fixtures, Year Book, 17 Edw. II. 518, lays down uncompromisingly the doctrine that when the lessee annexes anything to the freehold during his term, he cannot remove it. In this case the lessee of land built a house upon the land and afterwards pulled it down, and was adjudged guilty of waste in so doing. The principle laid down here is law to-day, subject to certain exceptions which have been engrafted upon it to meet the changed conditions of trade and agriculture and the advance of social and domestic comfort in the matter of improved household surroundings. The earliest exception to be recognized was in respect of articles brought upon the premises by a tenant in furtherance of his trade, Lord Holt in *Poole's Case* (1703) 1 Salk. 368, stating that the common law permitted the removal of such chattels in order to encourage industry and commerce. A determined attempt was made to extend the doctrine to agricultural implements, but in the leading case of *Elwes v. Maw* (1802) 3 East, 38, Lord Ellenborough, after an exhaustive review of the authorities, adhered to precedent, and ruled that a tenant had no right to sever chattels attached or erected by him for agricultural purposes.



Subsequently a series of decisions, commencing in the year 1701, slowly established another exception in favour of matters of ornament and articles of domestic use and convenience; but it was only as late as 1851 that the farmer was afforded statutory relief by the Imperial Act from the extreme rigour of the common law rule.

An article may be a fixture as between landlord and tenant, which is not such between an heir-at-law and an executor. In the latter case the criterion is whether the fixtures were put up for the benefit of the inheritance or not: *Hughes v. Towers* (1866) 16 U. C. C. P. 287. So the case of landlord and tenant differs from that of mortgagor and mortgagee: *Climie v. Wood* (1869) L. R. 3 Ex. 257; 4 Id. 328; or vendor and purchaser: *Gardiner v. Parker* (1871) 18 Gr. 26, 29. Between landlord and tenant a greater latitude and indulgence have always been allowed than in the other cases, in favour of the claim to have any particular articles considered as personal chattels as against the claim in respect of the freehold or inheritance: *Elwes v. Maw* (1802) 3 East, 38, 51.

In *Gordon v. Fraser* (1918) 43 O. L. R. 31; 14 O. W. N. 165, a mortgagor of land by a mortgage containing the ordinary clause by which the mortgagor is entitled to possession until default, and the usual attornment clause, argued that as the relationship of landlord and tenant was created by the attornment clause, he was entitled to remove store fixtures as tenant's fixtures: Middleton, J., however, held that this was not the situation, saying at p. 32: "By the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and if the clause creates the relationship of landlord and tenant, the fixtures are the landlord's and cannot be removed by the tenant. As tenant he was bound, on the expiry of the term, to surrender them to his lessor. But the true relationship is that of mortgagee and mortgagor;" and see p. 874, *post*.

In *Re Hulse, Beattie v. Hulse* [1905] 1 Ch. 406, Buckley, J., said, at p. 411: "The question has been argued whether the true principle is that where the tenant fixes chattels to the freehold with the right to remove them

during the term, that right is an exception which *enables him to remove part of the freehold*, or an exception by which the chattels *do not become part of the freehold*," and he inclined to the latter view.

But in *Bain v. Brand* (1876) 1 A. C. 769, Lord Cairns, C., had already answered this question in the opposite way, and said that the statement that a trade fixture remained a chattel, the removable property of the tenant *quoad omnia*, was an error; "it does become part of the inheritance, it does not remain a movable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it *continues* to be that which it became when it was first fixed, a part of the inheritance."

The view of Buckley, J., was questioned in an article in the *Solicitors' Journal*, reprinted in (1910) 30 C. L. T. 1010, where Lord Cairns' view is supported, and where it is pointed out that "Lord Cairns' statement of the principle seems to be necessary in order to support the rule that the tenant—if he wishes to exercise his right of removing the fixtures—must do so during the term. If they remained his movable property throughout he would not lose his interest in them because on quitting he happened to leave them behind. He could in such a case claim them in trover just like any other movable which he did not take with him."

The view of Buckley, J., is doubted by Mr. Lightwood, the author of the article on Landlord and Tenant in 18 Hals., in his note (f) p. 421-422, where he refers to *Bain v. Brand* (*supra*); *Minshall v. Lloyd* (1837) 2 M. & W. 450, and other authorities; and by Rose, J., who, in *Devine v. Callery* (1917) 40 O. L. R. 505; 12 O. W. N. 112 [App. Div.], following *Horwich v. Symon* (1914) 110 L. T. R. 1016, (1915) 84 L. J. (K.B.) 1083; *Hallen v. Runder* (1834) 1 C. M. & R. 266, and *Stack v. Eaton* in preference to *Re Hulse*, held that such chattels did become part of the freehold.

So that while it is clear that a fixture is a personal chattel annexed or fastened to real property [Article 127], in regard to the right of severance and removal,

the term is used in two directly contradictory senses; (a) a chattel so annexed which has thereby become in law part of the real property, and cannot legally be severed and removed without the consent of the owner of the real property; (b) a personal chattel so annexed, but which, when it becomes part of the land, may be severed (when it again becomes a chattel) and removed at will by the person who has annexed it or his representative: see *Grier v. The Queen* (1894) 4 Ex. Ct. 178-9.

In the case of *Argles v. McMath* (1894) 26 O. R. 224; 15 Occ. N. 85; 31 C. L. J. 210; (1896) 23 A. R. 44, the Court divided fixtures into two classes: those which are irremovable, such as doors and windows, the property in which passes to the landlord, and those which are removable, being things attached for purposes of trade or domestic convenience or ornament, including all things affixed to the freehold for a temporary purpose or for the more complete enjoyment and use of them as chattels.

As between landlord and tenant, fixtures are sometimes divided into—(1) Tenant's fixtures; (2) Landlord's fixtures. "Tenant's fixtures" are personal chattels annexed to the freehold by the tenant during the term, either for the purposes of his trade or for mere ornament and convenience, and which he has a right to sever and remove during the term, in the absence of any express stipulation or local custom to the contrary. "Landlord's fixtures" are those put up by the landlord before or during the term, or by any previous owner or tenant, or by any other person; also such fixtures put up by the tenant during the term as the tenant has no right to remove. All these constitute *part of the freehold, and also part of the premises demised*. In a more confined sense "landlord's fixtures" mean those fixtures which are on the premises at the time of the lease, and are demised therewith, and are usually specified in a schedule to the lease or agreement, to which may be added such erections and fixtures subsequently added by the tenant as he is not entitled to remove during the term.

*Trade Fixtures.*

Things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him during the term whenever the removal is not contrary to any express or implied stipulation in his lease or the custom of the country: *Culling v. Tufnal* (1694) Bull. N. P. 34; *Wetherell v. Howells* (1808) 1 Camp. 227; *Davis v. Jones* (1818) 2 B. & Ald. 165; and where the articles can be removed without causing material injury to the estate: *Cartwright v. Herring* (1904) 3 O. W. R. 511 [Ferguson, J.]; and may be removed without being entirely demolished or losing their essential character or value: *Fisher v. Dixon* (1845) 12 Cl. & Fin. 312; *Hughes v. Towers* (1866) 16 U. C. C. P. 287.

*Buildings.*

Though a building may be raised on a brick foundation and have a brick chimney, yet if the erection of such foundation is of wood and the building used for the purpose of trade or manufacture, the tenant may remove it before or at the end of his term: *Penton v. Robart* (1801) 2 East, 88; 4 Esp. 33; approved of in *Argles v. McMath* (*ante*, 839); by Anglin, J., in *Cronkhite v. Imperial Bank of Canada* (1906) 14 O. L. R. 271, at p. 273 (Anglin, J.—Div. Ct.); (1896) 23 A. R. 44, and in *Mears v. Callendar* [1901] 2 Ch. 388; although criticised in *Elwes v. Maw* (1802) 3 East, 38; 26 O. R. 224.

A granary resting by its mere weight on staddles built into the land is a chattel, and not a fixture in the ordinary sense of the word, though it may pass by that word if, from the rest of the conveyance, an intention appear of comprehending farm machinery in general: *Wiltshire v. Cottrell* (1853) 1 E. & B. 674.

The principle in favour of buildings erected for the purposes of trade has been extended to many buildings which come by no means strictly under that term; thus in the famous case of the cider-mill, although the mill was put up in part of the enjoyment of the real estate,

yet as the making of cider was a species of trade, the mill was considered to fall within the general exception in favour of trade fixtures: *Lawton v. Lawton* (1743) 3 Atk. 13; but that case has been disapproved of by the House of Lords, and is not to be relied on: *Fisher v. Dixon* (1845) 12 Cl. & Fin. 312; *Walmsley v. Milne* (1859) 7 C. B. N. S. 115; 29 L. J. (C.P.) 97

*Prima facie* an hotel is part of the freehold, but if it has been erected by a tenant for the purposes of trade, it is to be regarded, in the absence of evidence to the contrary, as a trade fixture. A tenant completed upon the demised premises a building partly erected by a former tenant, through whom he claimed, and which was erected and used by both for trade purposes, and then held over after the expiration of the lease to the first tenant, and was subsequently granted a new lease by his landlord with the usual covenant to repair, and a proviso that the lessee should have the privilege at the expiration of the term of removing any building erected on the demised lands unless the same should be purchased by the lessor at a price to be fixed by the lessee; and it was held that the building remained the property of the tenant as a trade fixture and could be removed by him at any time during the term: *Gray v. McLennan* (1885) 3 M. R. 337.

A building rested upon rocks placed on the soil, the chimneys were supported on poles which rested on the rock. The front door stoop supported on wooden posts was firmly attached to a wooden sidewalk. *Hunter, C.J.* (1909) 10 W. L. R. 110; 29 C. L. T. 634 [B.C.], held that it was part of the freehold and the mere fact that it could be removed without materially injuring the freehold did not permit the tenant to remove. His decision was reversed by the Full Court and the Supreme Court of Canada dismissed an appeal: *Bing Kee v. Yick Chong* (1910) 43 S. C. R. 334. See also *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 29 C. L. T. 1177; 11 W. L. R. 520 [Sask.—Lamont, J.].

A lease made under the Short Forms Act permitted the lessor to continue its mining operations without hin-

drance, and to that end provided for cancellation by the lessor on six months' notice, in which case only the lessor was to pay the lessee the value of any buildings erected upon the lands. The lessee erected a brick building on a cement foundation, cemented to the natural rock. Clute, J., held (Mulock, C.J. Ex., and Sutherland, J., concurring; Ferguson, J.A., dissenting; Riddell, J., expressing no opinion), that the building was not intended to be a trade fixture or a chattel that might be removed under any circumstances; and that the building became part of the land and passed to the lessor. *Struthers v. Chamandy* (1918) 42 O. L. R. 508; 14 O. W. N. 61 [App. Div.].

Advertising hoardings are trade fixtures: *Credit Foncier Franco-Canadien v. Lindsey Walker Limited*, p. 828 (*ante*).

See also *Scott Fruit Co. v. Wilkins Reece* [1920] 3 W. W. R. 155 [Alta—Hyndman, J.].

### *Machinery.*

A steam engine and boiler put into a carpenter's shop and manufactory of agricultural implements are trade fixtures and removable by the tenant: *Pronquey v. Gurney* (1876) 37 U. C. R. 347; (1874) 36 U. C. R. 53. So a fire engine or steam engine set up by a tenant for the purpose of working a colliery may be removed by him during the term: *Lawton v. Lawton* (1743) 3 Atk. 13; *Dudley v. Warde* (1751) 1 Ambler, 113.

The saws and other machinery of a saw-mill which are essential to the working of the mill are not trade fixtures severable from the mill, but may be taken possession of by the assignee of the reversion at the end of the term: *Richardson v. Ranney* (1851) 2 U. C. C. P. 460; see also *Donkin v. Crombie* (1861) 11 U. C. C. P. 601.

A steam engine and boiler annexed to the freehold for the more convenient using of them and not to improve the inheritance, which are capable of being removed without any appreciable damage to the freehold, are clearly trade fixtures which a tenant might remove as

against his landlord, though they would pass under a mortgage of the freehold to the mortgagee: *Climie v. Wood* (1868) L. R. 3 Ex. 257; 4 Id. 328; 37 L. J. (Ex.) 158; 38 L. J. (Ex.) 223.

A windmill was held to be a fixture in *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 11 W. L. R. 520; 29 C. L. T. 1177 [Sask.—Lamont, J.].

### *Trade Fittings and Fixtures.*

Gas fittings put in a shop by the tenant are not fixtures, but may be removed by him at the expiration of his term. An agreement by a tenant of a shop that if his landlord would make certain improvements therein, the tenant would put in gas fittings and fixtures and leave them there when the lease expired, does not make such fittings fixtures at common law. Such an agreement is executory and vests no property in the gas fittings in the landlord until the tenant leaves the shop: *Dunn v. Garrett* (1851) 7 N. B. R. 218.

A hardwood flooring put down by the tenant of a roller skating rink specially for the purpose of skating, and capable of removal, is a tenant fixture: *Howell v. Listowel Rink and Park Co.* (1887) 13 O. R. 476.

In *P. Burns & Co. v. Godson* [1917] 3 W. W. R. 966 [B.C.—Gregory, J.], affirmed [1918] 3 W. W. R. 587; [C.A.] [1919], 1 W. W. R. 848; 39 C. L. T. 24 [S. Ct.—Can.], it was held that marble topped counters, glass cases, cash and accountant's offices, a cold storage and a small heating plant were trade fixtures in a butcher's business.

*Cronkhite v. Imperial Bank* (1906) 14 O. L. R. 270 [Div. Ct.]. A bank vault door, the property of a tenant bank, brought on the demised premises by the bank, and being on staples, was held to be a trade fixture by Anglin, J., but the Divisional Court seemed to incline to the opinion it had always remained a chattel; and see *Canadian Bank of Commerce v. Lewis* [considered at p. 853, *post*].

*Argles v. McMath* (1895) 26 O. R. 224; 15 Occ. N. 85 [Div. Ct.] (1896) 23 A. R. 44 [C.A.]. In this case the

tenant carried on a general dry goods business. It was held that shelving and office fittings; brass window fixtures and mirrors; awnings and gas-fixtures put in by the tenants during the currency of their lease were trade fixtures, and Armour, C.J., p. 247, suggests that the brass window fixtures and mirrors might well be said to be affixed for their more convenient use as chattels and never to have lost the quality of chattels.

A lessee of a dwelling-house for a term of five years, with the privilege of renewing under a written lease, covenanted to surrender the premises in as good condition as reasonable wear and use would permit, and the lessor agreed to allow the lessee to remove the lower front room windows, lower the floor, substitute a shop front and make such alterations as might be required for the completion of the shop. The lessee made the alterations, and at the end of the term quit the premises, having removed the counters and shelving and a lead pipe and sink; and it was held that he was entitled to remove these articles as trade fixtures: *Laidlaw v. Taylor* (1880) 14 N. S. R. 155.

A bar cabinet and a beer pump in an hotel were held to be tenants' fixtures: *Simmons v. Mulhall* (1913) 24 O. W. R. 736; 4 O. W. N. 1424; 11 D. L. R. 781 [Clute, J.].

#### *Agricultural Fixtures.*

Farm buildings erected by a tenant for agricultural purposes and which cannot be removed without injury to the freehold are not removable: *Elwes v. Maw* (1802) 3 East, 38.

The privilege established in favour of tenants in trade does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry; even though the premises be left in exactly the same state as upon the tenant's entry: *Elwes v. Maw* (*supra*).

Therefore a tenant in agriculture, who erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop,



fuel-house, cart-house, pump-house and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, could not remove the same, even during his term, and although he thereby left the premises in the same state as when he entered. The Court clearly considered that there was a distinction between annexations to the freehold for the purposes of trade, and those made for the purposes of agriculture, and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former: *Elwes v. Maw* (ante); *Williams v. Williams* (1810) 12 East, 209.

If the object and purpose of the erections relate partly to trade of any description, the tenant may remove them: nurserymen have been allowed to remove trees and shrubs which they have planted for the purposes of sale: *Wardell v. Usher* (1841) 3 Scott, N. R. 508; but not to plough up strawberry beds out of the ordinary course of management of the nursery-ground: *Wetherell v. Howells* (1808) 1 Camp. 227; and it would seem that they cannot remove hothouses, greenhouses, forcing-pits and erections of that description. In no case can private persons sell or remove fruit trees, although planted by themselves: *Wyndham v. Way* (1812) 4 Taunt. 316, Heath, J.; Com. Dig. tit. Waste (D. 3); nor hedges, nor flowers, nor even a border or edging of box: *Empson v. Soden* (1833) 4 B. & Ad. 655.

In *Premier Dairies Ltd. v. Garlick* (1920) 89 L. J. Ch. 332 [Peterson, J.], it was laid down that the parties could contract themselves out of the Agricultural Holdings Act, which has no Canadian counterpart, and *Mears v. Callender* was applied holding that a tenant who had covenanted to yield up "all new and other buildings and erections" was not entitled to compensation for buildings and fixtures erected by him during the term or to remove them.

In *Mears v. Callender* [1901] 2 Ch. 388; 70 L. J. (Ch.) 621; 17 T. L. R. 518; 21 C. L. T. 329, a case turning on the provisions of certain English Statutes, it was laid down that apart from the Acts glass houses put up by a market gardener for the purposes of his business were

trade fixtures and removable. Under the Acts he was also allowed compensation for fruit trees planted by him on the demised premises.

Mr. E. B. Brown refers at 21 C. L. T. 329 to an action [*Sorley v. Baldwin*] being brought in Ontario in respect of trees planted and being settled at the trial, the lessee being paid a substantial sum.

See also *In re Harney and Mann's Arbitration* (1920) 89 L. J. (K.B.) 687 [C.A.].

### *Manure Piles and Straw Stacks.*

A farm lease provided that the manure and straw should not be removed by the tenant but should be expended by him on the farm. The lease was made by a life tenant, who died before the date set for the expiration of the term. It was held that the effect of this covenant was that the lessor "had no right to take these things away from the place; nor when left on the place had he any right to be paid for them." *Beaty v. Gibbons* (1812) 16 East, 116, 118, and *Roberts v. Barker* (1833) 1 Cr. & M. 808, followed: *Atkinson v. Farrell* (1912) 27 O. L. R. 204; 4 O. W. N. 73; 8 D. L. R. 582 [Div. Ct.]. In *Atkinson v. Farrell*, the Court had to consider *Gardner v. Perry* (1903) 2 O. W. R. 681; 23 Occ. N. 295 [Osler, J.A.]. In that case a life tenant leased a farm for five years and six months, "provided the lessor, who is tenant for life, shall so long live." The lease contained a covenant that the manure and straw should not be removed by the tenant, but should be used on the farm. It was held that the executors of the life tenant were not entitled to the straw and manure as emblements, their testatrix not having been the actual occupier or cultivator of the lands on which it was produced. But for the lessee's covenant they would have been entitled to the straw and manure, which was collected in heaps, as emblements. The covenant precluded the lessees from making any such claim.

Boyd, C., delivering the judgment of the Court in *Atkinson v. Farrell* (*supra*) held that the decision in *Gardner v. Perry* (*supra*) was not to be followed on this

point. He held that the straw stacks and manure piles were not emblements: that they were chattels of the tenant to be used in a particular way: the straw as fodder and bedding to be turned into manure and the manure into the land to enrich and become part of it. The covenant was inserted to ensure proper cultivation of the land: *In re Hall and Lady Meux* [1905] 1 K. B. 588 [C.A.], per Vaughan Williams, L.J., at p. 590. But apart from covenant, the dung made on the farm belonged to the farm: *Hindle v. Pollitt* (1840) 6 M. & W. 529, and to remove it would be a failure to work the land in an husbandlike manner and an injury to the inheritance: *Cheetham v. Hampson* (1791) 4 T. R. 318; *Walton v. Johnson* (1848) 15 Sim. 352; *Powley v. Walker* (1793) 5 T. R. 373. "The straw and manure must be regarded as constructive fixtures the destiny of which is to be incorporated in the soil": per Boyd, C., 27 O. L. R. at p. 212.

In *McCarthy v. McCarthy* (1900) 20 Occ. N. 211 [Barron, Co.J.—Perth], a case between vendor and purchaser, it was held that stones collected on the farm and piled became chattels, and boards and fence rails in piles also were chattels; but that a hay-fork attached to the barn and part of a plant consisting of a track, pulleys, truck, etc., was part of the freehold.

### *Ornaments.*

Articles put up for ornament and convenience during the term have long been allowed to be taken away by the tenant at the expiration of his lease. They are considered rather as articles of fixed furniture, or of utility and domestic convenience, than as parts of the house or freehold: *Birch v. Dawson* (1834) 2 A. & E. 37; 6 C. & P. 658.

The relaxation of the general rule in these instances is an indulgence, which is an exception only, and though to be fairly considered is not to be extended: *Buckland v. Butterfield* (1820) 2 Brod. & B. 54. It is a privilege of a more limited nature than that in respect of trade

fixtures: *Buckland v. Butterfield* (*supra*); *Leach v. Thomas* (1835) 7 C. & P. 327; although such distinction does not appear to have been taken in many of the early cases: *Beck v. Rebow* (1707) 1 P. Wms. 94.

Fixtures for ornament or convenience cannot be removed where the erection may be deemed a permanent improvement, and cannot be conveniently detached and removed without material injury or damage to the house or freehold; thus, a conservatory erected on a brick foundation, affixed to, and communicating with rooms in, a dwelling-house, by windows and doors, may not be removed by a tenant for years, who has erected it during his tenancy; although he has a reversion in fee after the death of his lessor: *Buckland v. Butterfield* (*supra*); *West v. Blakeway* (1841) 2 M. & G. 729; 9 Dowl. 846. And upon the same principle it has been held that ranges, ovens and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of *fi. fa.*: *Wynne v. Ingilby* (1822) 5 B. & Ald. 625. Window-sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold: *R. v. Hedges* (1779) 1 Leach. C. C. 201; 2 East, P. C. 590, n.; so a pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture: *Grymes v. Boweren* (1830) 6 Bing. 437.

Some of the articles for ornament and convenience, which have been held to be removable, are: hangings, tapestry and pier glasses, whether nailed to the walls or panels, or put in lieu of panels: *Beck v. Rebow* (*ante*): cornices: *Avery v. Cheslyn* (1835) 3 A. & E. 75; 5 N. & M. 370; marble or other ornamental chimney-pieces: *Lawton v. Lawton* (*ante*); *Lawton v. Salmon* (1782) 1 H. Blac. 260, n.; *Leach v. Thomas* (1835) 7 C. & P. 327; *Bishop v. Elliott* (*ante*); marble slabs: *Allen v. Allen* (1729) Moseley, 112-113; wainscot fixed to the walls by screws: *Lawton v. Lawton* (*supra*); *Ex parte Quincey* (1750) 1 Atk. 477; *Dudley v. Warde* (1751) Ambler, 113; grates, ranges and stoves, although fixed in brick-work:

*Lee v. Risdon* (1816) 7 Taunt. 188; *R. v. St. Dunstan* (1825) 4 B. & C. 686; iron backs to chimneys: *Harvey v. Harvey* (1740) 2 Stra. 1141; beds fastened to the walls or ceiling: *Ex parte Quincey* (1750) 1 Atk. 477; furnaces and coppers: *Squier v. Mayer* (1701) 2 Freem. 249; coffee and malt-mills: *R. v. Londonthorpe* (1795) 6 T. R. 377; cupboards fixed with hold-fasts: *R. v. St. Dunstan* (1825) 4 B. & C. 686; bookcases standing on brackets and screwed to the walls: *Birch v. Dawson* (1834) 2 A. & E. 37; 4 N. & M. 22; 6 C. & P. 658.

In the absence of express stipulation to the contrary, a mortgagor in possession may permit his tenant to bring fixtures on to mortgaged premises after the mortgage, and the tenant may remove them before the mortgagee takes possession: *Credit Foncier Franco-Canadien v. Lindsay Walker Co.* [1919] 2 W. W. R. 385 (Sask.—Taylor, J.); affirmed [1919] 2 W. W. R. 925 [C.A.]; *Sanders v. Davis* (1885) 15 Q. B. D. 218; 54 L. J. (Q.B.) 576; *Gough v. Wood* [1894] 1 Q. B. 713; 63 L. J. (Q.B.) 564; and see *Ellis v. Glover & Hobson Ltd.* [1908] 1 K. B. 388; 77 L. J. (K.B.) 251; *D'Auginey v. Brunswick Balke-Collender Co.* (*ante* p. 832), as to mortgagees and mortgagors.

The Rule was applied to a licensee of the mortgagor in *Credit Foncier Franco-Canadien v. Lindsay Walker Co. Ltd.*

A mortgage of all a leaseholder's interest in a property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property, even if placed upon it after the date of the mortgage: *Meux v. Jacobs* (1875) L. R. 7 H. L. 481; 44 L. J. (Ch.) 481; 32 L. T. 171. But the fixtures of the tenant of the mortgagor brought by him upon the demised premises after the mortgage, do not pass to the mortgagee, but may be removed by the tenant after a sale of the property by the mortgagee under a power in his mortgage: *Sanders v. Davis* (1885) 15 Q. B. D. 218; 54 L. J. (Q.B.) 576; approved in *Gough v. Wood*. A mortgagor in possession may make arrangements for acquir-

ing trade fixtures which will be removable by the party supplying them at any time before the mortgagee has taken possession: *Gough v. Wood* [1894] 1 Q. B. 713 [C.A.].

Where an under-lease contains an express covenant by the under-lessee to deliver up all landlord's fixtures at the end of the term, a representation and covenant by the grantors of the under-lease that the under-lessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors have not entered into covenants inconsistent with such right, cannot be implied: *Porter v. Drew* (1880) 5 C. P. D. 143; 49 L. J. (Q.B.) 482.

The defendant was tenant in possession of a mortgagor under a verbal lease made after the mortgage was executed and registered. The plaintiff was purchaser of the lands at a mortgage sale. After the sale the plaintiff entered and cut the tenant's crop. The tenant then removed it before the period of twenty days within which, by the order for sale, possession was to be given. It was held that the tenant had the right to remove the crop until legally divested of possession, and that the plaintiff could not so divest him until the sale was confirmed: *Stevens v. Ullerich* (1911) 4 Sask. L. R. 170; 17 W. L. R. 568 [Johnstone, J.].

### *The Manner of Severance.*

"Fixtures can be as effectually severed from the land by a stroke of the pen as by a stroke of axe and hammer," per Meredith, C.J.O., in *Devine v. Callery* (1917) 40 O. L. R. 505; 12 O. W. N. 112 [App. Div.]. Here the tenant built a small frame house on the lot he occupied on the understanding that he was to have the right to remove it. He sublet the lot to D. with his landlord's consent; the landlord agreeing in a short lease that D. should have the privilege of removing the house at the end of the term. It was held that the lease was not a mere license: that the privilege so expressed was not mere leave but an essential part of the lease, and the house was not part of the realty but a chattel which D. might remove.

*The Right of the Tenant to Remove Fixtures is Assignable.*

“The right of a tenant to remove buildings from land is a power, license (call it what you will), coupled with an interest: *Poole's Case* (1703) 1 Salk. 368; *Minshall v. Lloyd* (1837) 2 M. & W. 450—and is of course assignable”: per Riddell, J., in *Devine v. Callery*, *supra*. It may be assigned by deed: *Hallen v. Runder*, *post*; *Oswald v. Whitman* (1889) 22 N. S. R. 13.

“Such cases as *Hallen v. Runder* (1834) 1 C. M. & R. 266, and *Lee v. Gaskell* (1876) 1 Q. B. D. 700, make it plain that (the tenant's) right was one that could be assigned, and that for its assignment no deed, or even writing, was necessary”; per Rose, J., in *Devine v. Callery* (*ante*).

In *Butterworth v. Ketchum* (1904) 3 O. W. R. 844, MacMahon, J., held, following *Close v. Belmont* (1875) 22 Gr. 317, that an oral agreement to permit the removal of a bicycle shed was binding upon the lessor's assignee. It follows his property in the fixtures as against the landlord: see *Cumberland v. Maryport* [1892] 1 Ch. 415; and continues only during his original term: *Lee v. Risdon* (1816) 7 Taunt. 188; *Colegrave v. Dias Santos* (1823), 2 B. & C. 76.

. Trade fixtures passed through the hands of various tenants on several reorganizations of a business which took place, and finally the last tenant assigned to an assignee for the benefit of creditors. The assignee gave a disclaimer and it was held he might remove the fixtures: *Wintemute v. Taylor* [1919] 2 W. W. R. 882 [B.C.—Clement, J.].

Whether the tenancy be for life, or for years, or from year to year, or only at will, makes no difference with respect to his right to remove fixtures; nor whether he holds under a lease by parol, or by writing, or under seal (except as to any stipulations on the subject therein contained). It is however to be observed that every case in which there is a right of severing a thing from the freehold by virtue of the law of fixtures is consid-

ered as an exception to the general rule: *Buckland v. Butterfield* (1820) 2 Brod. & B. 54.

•            *The Time of Severance.*

Unless otherwise provided by the contract between the parties, the tenant must exercise his right of removal before the expiry of the term or of any period during which he is entitled still to consider himself a tenant, and if he omits to do so the goods become the property of the owner: *Nelles v. McNee* (1906) 7 O. W. R. 158 [Boyd, C.]; *Dundas v. Osment* (1906) 7 Terr. L. R. 342; 4 W. L. R. 116; 6 W. L. R. 86 [Newlands, J.—Ct. en B.—N.W.T.]; *Credit Foncier Franco-Canadien v. Lindsay Walker Co.* [1919] 2 W. W. R. 385; [1919] 2 W. W. R. 925 [Sask.—Taylor, J.C.A.]; *Veterans' Manufacturing and Supply Co. v. Harris* (1920) 19 O. W. N. 226 [App. Div.].

There is no right of removal after the expiration of the lease if the tenant holds over wrongfully: *Dundas v. Osment*.

A tenant gave a chattel mortgage on a building which had been erected by him as a trade fixture, and the building was about to be sold by auction by the mortgagee during the term. The landlord hearing of it went to the place advertised, where he was informed that the wife of the tenant was going to buy in the building at auction. Satisfied with this, he went away before the sale, making no objection to it, and taking no steps to warn bidders of any claim that the building had become part of the freehold and had passed to him as such; but, on the contrary, giving the bailiff conducting the sale a distress warrant under which the landlord was to be paid a portion of the proceeds of the sale; and it was held that as against a purchaser ignorant of the landlord's rights, the latter was estopped from claiming the building as a part of the freehold and from asserting any right to restrain the removal during the term: *Gray v. McLennan* (1886) 3 M. R. 337.

In *Lucas v. McFee* (1908) 12 O. W. R. 939 [Div. Ct.], it was held that under a covenant to repair all buildings



erected or to be erected and to yield up the premises in good repair, the tenant had no right to remove a corn-crib he had erected, and damages in the amount necessary to put the building in the condition covenanted for, see *Joyner v. Weeks* [1891] 2 Q. B. 31 [C.A.], were given.

But, in the absence of special contract, tenant's fixtures cannot be removed after the termination of the lease, and this rule applies whether the lease determines by effluxion of time, or by re-entry on forfeiture: *Saskatchewan Elbow Wheat Land Co. v. Gombar* (1909) 11 W. L. R. 520; 29 C. L. T. 1177 [Sask.—Lamont, J.]; *Dundas v. Osment* (1906) 4 W. L. R. 116 [Newlands, J.]; 7 Terr. L. R. 342; 6 W. L. R. 86 [Full Ct.]. Where there is such contract, the tenant has a reasonable time in which to do so after the end of the term: *Pugh v. Arton* (1869) L. R. 8 Eq. 626; 38 L. J. (Ch.) 619; *Stansfield v. Mayor Portsmouth* (1858) 4 C. B. N. S. 120.

The weight of authority, however, is that a tenant may remove trade fixtures which he might have removed during the term, if he remain in lawful possession after the end of the term, holding possession of the premises under a right still to consider himself as tenant: *Pronquey v. Gurney* (1874) 36 U. C. R. 53; *Gray v. McLennan* (1885) 3 M. R. 337; *Penton v. Robart* (1801) 2 East, 88; 4 Esp. 35.

In the circumstances set out at p. 851, *ante*, it was held the assignee for creditors had three months in which to remove trade fixtures: see the Creditors Trust Deeds Act, R. S. B. C. 1911, c. 13, s. 55 (1); *Wintemute v. Taylor* [1919] 2 W. W. R. 882.

Tenants moved a safe into the rented building, and their landlords, at their request, built a brick vault around the safe. The tenant had an agreement with the landlords by which they might remove the safe. They moved out, leaving the safe in the premises, and it was used by succeeding tenants. During this period the landlords made structural alterations, putting up a mezzanine floor resting in part on the safe, and later sold the premises to L., who knew nothing of the agreement as to

removal. It was held that although as against their landlords the safe was removable, the right of removal was lost when the premises were sold to L: *Canadian Bank of Commerce v. Lewis* (1907) 5 W. L. R. 194; 12 B. C. R. 398; 27 C. L. T. 282 [C.A.].

Defendants under an agreement with the owner erected a bill-posting hoarding on certain land against which the plaintiffs had taken foreclosure proceedings under mortgage and obtained an order *nisi*. The plaintiffs subsequently obtained foreclosure and title. Prior thereto the defendants had no knowledge of the mortgage. The order *nisi* and final order decreed foreclosure absolute as against the mortgagor and those claiming through or under her and that all persons claiming through or under the mortgagor in possession of the premises should give up possession to the plaintiffs within 20 days after service upon them of a copy of the final order. Held that defendants were not tenants of the land but only licensees, but, as licensees, were in possession. Assuming the hoarding was a fixture, it was a trade fixture, and the defendants had a right to remove it, as they did, before being served with a copy of the final order as they were yet in possession. In view of the terms of their order the plaintiff could not say they were constructively in possession when they received their certificate of title. Judgment of Taylor, J. [1919] 2 W. W. R. 385 affirmed; *Credit Foncier Franco-Canadien v. Lindsay-Walker Co.* [1919] 2 W. W. R. 925 [C.A.].

On the forfeiture of the term and change of possession before the removal of trade fixtures they become the property of the landlord: *Joseph Hall Mfg. Co. v. Hazlett* (1885) 8 O. R. 465; (1885) 11 A. R. 749.

But when the party selling articles to a tenant retains his property therein, he may assert his right in the event of forfeiture, even where he knows they were to be attached to the freehold: *Id.*

So a tenant may remove trade fixtures within a reasonable time after the landlord's election to forfeit the term, and while the possession continues: *Argles v. McMath* (1894) 26 O. R. 224; 15 Occ. N. 85; 31 C. L. J.

210; (1896) 23 A. R. 44. But when the tenant continues in possession after his term expires, and after the landlord's election to treat him as a trespasser by issuing a writ to recover possession, he is not entitled to remove fixtures: *Barff v. Probyn* (1895) 64 L. J. (Q.B.) 481; 11 T. L. R. 467; *Penton v. Robart* (1801) 2 East, 88, not followed; *Deeble v. McMullen* (1857) 8 Ir. C.L.R. 355, and *Weeton v. Woodcock* (1840) 7 M. & W. 14, approved; and see *Dundas v. Osmont* (1906) 4 W. L. R. 116 [Newlands, J.]; 6 W. L. R. 86, 7 Terr. L. R. 342 [Full Ct.—N.W.T.]. Where steam engines were removable by the lessee and had not been removed previously to the lessor entering for a forfeiture, and the tenant quitting possession, it was held that trover could not be maintained for them: *Minshall v. Lloyd* (1837) 2 M. & W. 450; *Mackintosh v. Trotter* (1838) 3 M. & W. 184; but see *Sumner v. Bromilow* (1865) 34 L. J. (Q.B.) 130. Where the lessor enters for a forfeiture, on the tenant becoming bankrupt, neither the latter nor the assignees can afterwards sever or remove any fixtures: *Weeton v. Woodcock* (*supra*).

In *Wintemute v. Taylor* [1919] 2 W. W. R. 882 [B.C.—Clement, J.] in the circumstances noted at p. 851 (*ante*), Clement, J., said at p. 884:

“There was never any formal surrender of the lease held by any of the tenants. Such surrender as there was was by operation of law only. Under these circumstances, I do not think the right to remove trade fixtures was ever given up or put an end to. In my opinion the circumstances bring this case within the exception suggested in *Leschallas v. Woolf* [1908] 1 Ch. 641, 77 L. J. (Ch.) 345. I am quite sure nothing was further from the desire and intention of the tenants than to make a present to the landlord of the very valuable trade fixtures; and they certainly never signed any document of surrender. In my opinion, all the articles in dispute in this issue are made fixtures and can be removed without appreciable injury to the freehold. Apart from the effect of the disclaimer given by the defendant as assignee for the benefit of creditors, the law is, I think, correctly set forth in Halsbury, vol. 18,

pars. 880-885. In addition, on the question of the operation of the covenant to deliver up the premises in good repair (as set forth in long form in the Leaseholds Act, R. S. B. C., 1911, c. 135) I would particularly refer to the judgment of Armour, C.J., in *Argles v. McMath* (1894) 26 O. R. 224, where the authorities are collected. This judgment was unanimously affirmed by the Court of Appeal of that province (1896) 23 A. R. 44. Whether or not the defendant's disclaimer as assignee was strictly in conformity with the Creditors' Trust Deeds Act, R. S. B. C. 1911, c. 13, it had no operation to defeat the right of removal. Section 55 (1) makes this clear. During the three months' delay given by that sub-section, the right to removal subsists. The disclaimer in terms names May 3, 1919, as the date upon which the lease was to be determined; and we have no provision, like that in the English Bankruptcy Acts, making the determination relate back to any earlier time. In my opinion the rights of the parties here are to be determined as of February 7, 1919, when the injunction against removal issued."

And see also *Pole-Carew v. Western Counties and General Manure Co., Ltd.* (No. 2) [1920] 2 Ch. 97; 89 L. J. (Ch.) 559 [C.A.].

Where a tenant renews or extends his term, he must be careful to preserve his right to fixtures, for without some express stipulation on the subject, he may lose his right at the expiration of the first term: *Pronguey v. Gurney*, (1874) 36 U. C. R. 53.

If a tenant, with the right to remove fixtures, surrenders his term, either directly or by operation of law, and takes a new lease, the fixtures are included as part of the property leased by the landlord, and thus the tenant would lose his right to remove though in possession under the new lease. But it was held that neither the increase nor reduction of rent in this case operated as a surrender of the term, and an acceptance of the new tenancy so as to prevent the tenant from claiming the fixtures: *Pronguey v. Gurney* (1876) 37 U. C. R. 347.

Where there is no surrender of possession, and the tenant takes a new lease with an agreement, either express or implied, with the landlord that he shall still retain the right to remove the fixtures, his right is not lost by accepting such lease: *Gray v. McLennan* (1885) 3 M. R. 337.

But *Cronkhite v. Imperial Bank*, considered at length at p. 1113, *post*, seems to give greater latitude to the tenant than he heretofore had.

### *The Goods Become the Property of the Owners.*

A tenant who had a right to remove fixtures failed to do so before he surrendered his lease and took a new one: Held that the fixtures had become part of the freehold: *Cullen v. McPherson* (1900) 40 N. S. R. 241 [Townshend, J.]: *Devine v. Callery* (*ante*, p. 850).

If a tenant do not remove fixtures during his term, a subsequent tenant who holds a bill of sale of the fixtures from the prior tenant will lose his right to the fixtures: *Harrison v. Smith* (1887) 19 N. S. R. 516.

### *Exception.*

If the tenancy is of uncertain duration or the contract allowing removal does not provide for a time within which the chattels must be removed, the tenant has a reasonable time after the expiration of the term or—if the landlord has the “refusal” of them—after the refusal of the landlord, within which to remove the fixtures: *Devine v. Callery* (*supra*); *Oswald v. Whitman* (1889); 22 N. S. R. 13; *Gray v. McLennan* (1885) 3 M. R. 337.

The right of the tenant continues for a reasonable period, “during the exorcism on their term”: *Macintosh v. Trotter* (1838) 3 M. & W. 186, cited by Latchford, J., in *Smith v. Plymouth Cordage Co.* (1909) 14 O. W. R. 344.

It would rather seem that a tenant for years, who holds over on sufferance after the expiration of his term,

may during such holding over remove such fixtures as he might have removed during the term; but if he quit possession, pursuant to a notice and demand of possession, and leave any fixtures on the premises, his right to them is gone: *Leader v. Homewood* (1858) 5 C. B. N. S. 546.

The principle seems to be that he had the option to remove them or not during his tenancy, and that he exercised such option by not removing them: *Gibson v. Hamersmith R. Co.* (1862) 32 L. J. (Ch.) 337, 342.

Upon the determination of a tenancy at will by the lessor, the tenant may, within a reasonable time and before quitting possession, remove fixtures belonging to him and legally removable during his tenancy. So where a tenancy is determined by the death of the lessor: *Heap v. Barton* (1858) 12 C. B. 278; *Martin v. Roe* (1857) 7 E. & B. 237; 26 L. J. (Q.B.) 129.

Where the landlord during the term, by letter, declines to buy the tenant's fixtures, but adds, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant," such letter does not operate as a valid license (it not being under seal); and if the new tenant refuse to pay for the fixtures so left, or to permit them to be removed, no action of trover will lie for them whilst they remain unsevered from the freehold: *Roffey v. Henderson* (1851) 17 Q. B. 574; *Leader v. Homewood* (*supra*).

The parties may however alter their legal position by express contract: *Gray v. McLennan* (1885) 3 M. R. 337; and where the parties have made a special contract they have defined and made a law for themselves on the subject: *Davey v. Lewis* (1860) 18 U. C. R. 21. And where a lease gives the lessees a right to erect machinery, and provides that it be their property, and be removable by them without injury to the buildings, effect will be given to the contract in the lease, and any fixtures or machinery placed on the premises in pursuance thereof, will remain the property of the lessees notwithstanding an assignment in insolvency, and a forfeiture of the lease pursuant to a provision to that effect contained therein:

*Scarth v. Ontario Power Co.* (1893) 24 O. R. 446. In this case, however, the lessor permitted a purchaser of the machinery from the assignee in insolvency to remain in possession, paying rent for some time, when she ceased, leaving the machinery on the premises: see also *Ex parte Gould* (1884) 13 Q. B. D. 454; *Joseph Hall Manufacturing Co. v. Hazlett* (1883) 11 A. R. 749.

But a lease may expressly give the tenant a right to remove buildings: *Gray v. McLennan* (*ante*); *Laidlaw v. Taylor* (1880) 14 N. S. R. 155; *Oswald v. Whitman* (1889) 22 N. S. R. 13; *Thistlethwaite v. Sharp* (1912) 1 W. W. R. 946 [Sask.—Maclean, D.C.J.].

A contract for the sale of tenant's fixtures by a tenant to his landlord does not require a writing or come within either the 4th or 17th sections of the Statute of Frauds: *Lee v. Gaskell* (1876) 1 Q. B. D. 700; *Hallen v. Runder* (1834) 1 C. M. & R. 266; *Oswald v. Whitman* (1889) 22 N. S. R. 13; *Argles v. McMath* (1895) 26 O. R. 224. But where the tenant leaves them unsevered in the premises, after quitting possession, a license to enter and take them away given by the lessor is not valid as against the new lessee in possession unless under seal: *Roffey v. Henderson* (1851) 17 Q. B. 574; *Wilde v. Waters* (1855) 16 C. B. 637.

There will be a breach of a covenant that the lessor has not encumbered, charged, or affected the premises leased in any manner, if it appear that during the term covered by the covenant the lessor gave a license to a third party to remove trade fixtures. The lease should, in such case, guard against liability in respect of the right of any former tenant to remove such fixtures: *Cameron v. Tarratt* (1844) 1 U. C. R. 312.

### *The Covenant to Yield up in Repair.*

The tenant may by express agreement give up his right to remove even trade fixtures. Thus where he covenants to yield up in repair, at the expiration of the term, "all fixtures and things which at any time during the term shall be erected and made," he must yield up trade

fixtures which, otherwise, he would be entitled to remove.

But to deprive the tenant of his right to remove trade fixtures the language of the covenant must be clear, and the courts will construe the covenant strictly against the lessor.

*Cases where the Tenant Lost his Right of Removal.*

Thus, buildings erected for the purpose of trade, under leases containing covenants to yield up in repair, at the expiration of the term, all buildings which should be erected upon the demised premises, cannot be removed by the lessees, when the words of the covenant are general, and contain no exception of any particular sort of buildings: *Naylor v. Collinge* (1807) 1 Taunt. 19.

A covenant by a lessee that at the end of the term he would deliver up to the lessor the demised premises, "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-pans, slabs, and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," is confined to "landlord's fixtures," and does not prevent the lessee from removing or selling trade and other tenant's fixtures erected by himself during the term: *Bishop v. Elliott* (1855) 11 Exch. 113; 24 L. J. (Ex.) 229, considered in *P. Burns & Co. Ltd. v. Godson* [1917] 3 W. W. R. 966 [B.C.] at p. 970, by Gregory, J.; and see p. 865, *post*.

Where a lease contained a general covenant to repair, and lime-kilns were erected by the lessee during the term, it was held, that he could not remove them at the end of his term without committing a breach of covenant: *Thresher v. East London Waterworks Co.* (1824) 2 B. & C. 608. So salt-pans erected by a tenant during his term cannot be removed where the lease contains a covenant to leave the salt works in good repair at the end of the term: *Mansfield v. Blackburne* (1840) 6 Bing. N.C. 426.

A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots,



shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantle-pieces, chimney-jambs, foot-pans, slabs, covings, window-shutters, partitions, sinks, water-closets, cisterns, pumps and rails, water-tanks and other additions, improvements, fixtures and things which were and should be any way fixed or fastened upon the premises, and it was held that the general words could not be restricted (there being no assignable genus to which the enumerated articles belonged), and that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures: *Wilson v. Whateley* (1860) 1 Johns. & H. 436; 7 Jur. N. S. 908.

Where various engines and other fixtures used in mining and smelting were standing on the premises at the date of the demise, of which the engines were purchased by the incoming from the outgoing tenant, and were not mentioned in the general words of the demise, nor in the clause of re-entry; but the lessee covenanted to keep the "said engines" (the word "engines" never having occurred before) in good and tenantable repair, and the same in such state to yield up at the end or other sooner determination of the term; and the lessor covenanted that the lessee might remove (at the end of the term or sooner, except as in the cases and events before mentioned, in any of which, a taking in execution being one, it was made lawful for the lessor to enter) all such engines, etc., as had theretofore been erected, and all such as should by himself be erected for carrying on the smelting business; it was held, that upon a forfeiture of the demise by a taking in execution, the lessee had lost his right to recover any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties as collected from the covenants: *R. v. Topping* (1825) McClel. & You. 544; *Dumerque v. Rumsey* (1863) 2 H. & C. 777; 33 L. J. (Ex.) 88.

Where there is a covenant to yield up at the expiration of the term all erections and improvements made during the term, a greenhouse, the frame-work of which is laid on walls imbedded in mortar, cannot be removed,

although no damage is done to the walls by removing it: *West v. Blakeway* (1841) 2 M. & G. 729; 3 Scott, N. R. 218; 9 Dowl. 846.

A lease contained covenants by the lessee to keep and leave in repair the demised premises, "together with all wainscots, windows, shutters, fastenings, etc., and other things which then were, or at any time thereafter should be, thereunto affixed or belonging (looking-glasses and furniture excepted), and together also with all sheds and other erections and improvements which should be erected, built or made upon the demised premises." An assignee of the lease, during the term, removed an old shop-window, and put up in its place a plate-glass front, but without in any manner fastening it to the premises, except by means of wedges, and it was held, that this plate-glass front was either a "window" or an "improvement" within the true meaning of the covenant, and therefore irremovable by the tenant at the end of the term, although erected for the purposes of trade: *Haslett v. Burt* (1856) 18 C. B. 162, 893; 25 L. J. (C.P.) 295.

A lease of mines contained a covenant for the lessee to erect furnaces, iron-works, etc., and to repair and yield up the furnaces, fire-engines, iron-works, dwelling-houses and all other erections, etc., to be erected, built or set up, except the iron-work castings, railways, wimseys, gins, machines and the movable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises; and there was a power given to the lessor to purchase the excepted articles; it was held that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, though fixed in brick-work, but not what was in the nature of a building or support of a building, although made of iron: *Foley v. Addenbrooke* (1844) 13 M. & W. 174.

A lessee covenanted "at all times during the term to repair, support, amend and keep the demised premises with all necessary reparations and amendments whatsoever, and the said premises so repaired with the appurtenances and all things which, at the time of the execution of the said indenture, were, or at any time during

the term should be fixed or fastened to or set up in or upon the premises, at the expiration of the term, peaceably to yield up to the lessor, with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture, reasonable use excepted." It was held that the words "all things," in this covenant, extended to a small building which stood on blocks of wood not let into the ground; also to a building resting on stumps; also to an old frame building which was brought upon the premises and filled in with brick and laid upon scantling and old posts not let into the ground; all these being placed on the premises during the term: *Allardice v. Disten* (1861) 11 U. C. C. P. 278.

In *Re British Red Ash Collieries, Ltd.* (1919) 88 L. J. (Ch.) 212 [1920], 1 Ch. 326; 40 C. L. T. 524 [C.A.], it was held that a covenant in a mining lease to leave in good repair, on account of its specific description of the fixtures, applied to deprive a tenant of the right to remove trade fixtures, explaining *Lambourn v. McLellan* [*post* p. 865] as quite in harmony with *Climie v. Wood*. Swinfen-Eady, M.R., said at p. 214: "Reference was made to *Bishop v. Elliott* and *Dumergue v. Rumsey*. These were cases which depended upon the *ejusdem generis* rule . . . But here we are not embarrassed by the use of general words; we have a specific description." Then he refers to the rule in *Lambourn v. McLellan* (*post*, p. 865), and holds that the lease was drawn in the plain language required by that rule.

See also *Pole-Carew v. Western Counties and General Manure Co., Ltd.* (No. 2) [1920] 2 Ch. 97; 89 L. J. (Ch.) 559.

A lease provided for payment by the lessor for all buildings on the premises, but that it "should be lawful for the lessor to decline to pay for the buildings," in which case he covenanted to grant a new lease for a similar period at a similar rate. After the termination of the lease, the lessees continued on at the same rent, ignoring an offer to re-lease made to them by the lessor. Ferguson, J., in an action for possession and cross-action

by the lessees for a declaration that they were entitled to compensation for the building, refused to make the declaration, saying at p. 513: "There seems to be nothing to shew . . . that if a new lease had been executed in accordance with the plaintiff's covenant, it would or should have contained a contract to pay for the buildings at the end of the term granted in it": *Cartwright v. Herring* (1904) 3 O. W. R. 511 [Ferguson, J.].

### *The Construction of the Leases.*

"A lease ought not, I think, to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels unless such an intention is clearly expressed": per Turner, L.J., in *Duke of Beaufort v. Bates* (1862) 3 De G. F. & J. 381, at p. 390; 31 L. J. Ch. 481, quoted and followed by Armour, C.J., in *Argles v. McMath* (1895) 26 A. R. at p. 237. He also said, p. 239: "The cases of *Dean v. Allalley* (1799) 3 Esp. 11 . . . *Elliott v. Bishop* (*ante*): *Sumner v. Bromilow* (1865) 34 L. J. (Q.B.) 130, and *Cosby v. Shaw* (1888) 23 L. R. Ir. 181, all show the leaning of the Courts against such a construction of a lease as will deprive the tenant of his removable fixtures."

*Argles v. McMath* (*supra*), which was the case of a lease under the Short Forms Acts, is discussed at pp. 1111 (*post*) *et seq.*

And reference should be made to *Wintemute v. Taylor*, considered at p. 855 (*ante*). *Mears v. Callender* [at p. 845, *ante*], and *Premier Dairies Ltd. v. Garlick* [at p. 845, *ante*].

Where a lessee of a coal mine had covenanted at the end of the term to yield up the works and mines and all ways and roads in good repair, order and condition, so that the works might be continued and carried on by the lessor, it was held that such covenant did not include wooden sleepers, or iron train plates fastened to such wooden sleepers, used for the purpose of a railway or tramway from and to the mines: *Beaufort* [*Duke of*] *v. Bates* (*supra*).

In *P. Burns & Co. v. Godson* [1917] 3 W. W. R. 966 [B.C.—Gregory, J.], the lease, which apparently was not made under the Act, contained a covenant by the lessees to make certain alterations and improvements necessary for the requirements of a butcher-business. The lease also contained a covenant by the lessees that at the expiration of the term all improvements, alterations and fixtures constructed or made or to be made in and upon the premises, should become the property of the lessor. It was held that the “fixtures” referred to were those constructed under the first covenant, and that the tenant was not prohibited from removing trade-fixtures.

This part of the judgment was expressly affirmed by Macdonald, C.J.A. [1918], 3 W. W. R. 587 [B.C.—C.A.], though not mentioned by the other members of the Court, and again in the Supreme Court [1919] 1 W. W. R. 848; 58 S. C. R. 404; 39 C. L. T. 247.

A covenant to deliver up with “all doors, locks, keys, etc., buildings, improvements, fixtures and things which are now or which at any time during the said term hereby granted shall be fixed, fastened or belong to the said messuage and premises or any part thereof,” was held not to apply to certain machinery used by the lessee in his business, attached by him to the building by screws for its convenient user: *Lambourn v. McLellan* [1903] 2 Ch. 268; 72 L. J. (Ch.) 617; 19 T. L. R. 529; 23 C. L. T. 312.

Vaughan Williams, L.J., said, at p. 620 [277]: “It is very desirable that we should lay down such a rule that landlords and tenants may know once for all that when a house is let to a tenant for the purposes of a trade, if the landlord wishes to restrict his ordinary right to remove trade machinery or fixtures attached to the demised premises, as these machines are, so as to be more conveniently used, and not placed there as an addition or improvement to the premises, the landlord must say so in plain language”: and see *In re British Red Ash Collieries Ltd.* [p. 863, *ante*].

Trade fixtures, which are so removable by the tenant, are liable to sale under an execution against him: *Argles v. McMath* (1895) 26 O. R. 224; 23 A. R. 44. In one case it appeared that the execution debtor had leased certain premises in which were an engine and boiler to be left by him in working order at the end of the lease; that finding both unfit for his purposes, a large cylinder was put into the engine with the lessor's consent, and partly at her expense, which on being broken was replaced by another at the tenant's expense, as also a shaft-crank, fly-wheel, connecting rod, slides, etc., with a different kind of engine pump. A new boiler also instead of the old one was put into the premises by the tenant, and was by brickwork attached to the freehold; it was also removable. All the additions made by the tenant had been so made for the purposes of his trade, and, though attached to the freehold, could be removed with little injury thereto; the machinery being admitted by holes made in the walls and the shafting attached to the building. There were also certain drying presses, vats, and cocks in the building, and all were placed upon a temporary flooring supported by scantling and trestle work, not let into the walls or ground. The partitions of the building were of wood. It was held that the engine in its entire state belonged to the landlord as part of the freehold, and was not liable for the tenant's debts, but that the temporary doors, scantling, partitions, presses, shafting (other than had been before in the building), vats and cocks, were all trade fixtures, and so liable to seizure as against the tenant: *Hughes v. Towers* (1866) 16 U. C. C. P. 287.

Fixtures which may be removed by the tenant during his term constitute part of the freehold until severed therefrom: *Lee v. Risdon* (1816) 7 Taunt. 188; *Ex parte Lloyd* (1834) 1 Mont. & Ayr. 508. Until so severed they are not goods or chattels for which trover may be maintained; *Mackintosh v. Trotter* (1838) 3 M. & W. 184; *Roffey v. Henderson* (1851) 17 Q. B. 574; *Wilde v. Waters* (1855) 16 C. B. 637. But sometimes a special action may be maintained for preventing a tenant or any person

claiming under him from exercising his right to sever and remove the fixtures: *London & W. L. & D. Co. v. Drake* (1859) 6 C. B. N. S. 798, 811; 28 L. J. (C.P.) 297.

When fixtures, which have become part of the realty, and irremovable according to law, have been removed, such removal amounts to an injury to the reversion, which the law considers waste: *Hitchman v. Walton* (1838) 4 M. & W. 409; *Smith v. Render* (1857) 27 L. J. (Ex.) 83; and the landlord may either sue on the covenant or apply for an injunction to prevent the removal: *Kinlyside v. Thornton* (1776) 2 W. Blac. 1111; *Herne v. Bembow* (1813) 4 Taunt. 764; *Martyr v. Bradley* (1832) 9 Bing. 24; 2 Moo. & Sc. 25; *Holderness v. Lang* (1886) 11 O. R. 1. Although a landlord cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action; yet, immediately upon the severance of the fixtures from the realty, they become mere chattels, and he may maintain an action of trespass for taking them away, for the property is vested in him from the time of severance: *Farrant v. Thompson* (1822) 5 B. & Ald. 826. Again, where the fixtures have been unlawfully severed from the freehold and carried away or otherwise converted or disposed of, the landlord may maintain an action of trover for their value: *Hitchman v. Walton* (*supra*). A lessor can sue in detinue or trover for the recovery of specific articles wrongfully removed with the privity of the lessee from the demised premises during the tenancy: *Petre v. Ferrers* (1891) 61 L. J. (Ch.) 426; 65 L. T. 568.

Under the Criminal Code, R. S. C. 1906, c. 146, s. 360, every one who steals any chattel or fixture let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars, to four years' imprisonment.

A lessee cannot, even during the term, maintain trover for fixtures attached to the freehold: *Mackintosh v. Trotter* (1838) 3 M. & W. 184. But if a landlord during the

term severs fixtures from the freehold and distrains them, the tenant may maintain trover: *Dalton v. Whitem* (1842) 3 Q. B. 961; *Clarke v. Holford* (1848) 2 C. & K. 540. If a tenant leaves fixtures at the end of his term, and the landlord afterwards severs them, the tenant cannot maintain trover for them: *Lyde v. Russell* (1830) 1 B. & Ad. 394. Where a tenant assigned his lease by way of mortgage, but continued in possession and became bankrupt, whereupon the assignees removed fixtures, which by the lease were to be yielded up at the end of the term to the lessor; it was held that the mortgagee might maintain trover against the assignees: *Hitchman v. Walton* (1838) 4 M. & W. 409. If a lessee, who is possessed of tenant's fixtures, mortgage his term with the fixtures, and afterwards becomes bankrupt, the mortgagee may recover in trover the value of the fixtures from the assignees, who have removed and converted them: *Boydell v. M'Michael* (1834) 1 C. M. & R. 177; 3 Tyr. 974; *Horsfall v. Hey* (1848) 2 Exch. 778. Where the assignees of a bankrupt mortgagor, who had vested in his mortgagee an immediate interest in fixtures, severed and sold them; it was held that the mortgagee was entitled to recover from the assignees the value of the fixtures estimated as between outgoing and incoming tenant: *Thompson v. Pettit* (1847) 10 Q. B. 101. A lessee of a house containing fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures; he afterwards assigned the premises and all his estate and effects to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver up the fixtures; the trustees brought trover; and it was held that they could not recover for them: *Longstaff v. Meagoe* (1834) 2 A. & E. 167; 4 N. & M. 211. A lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant, and it was held that the mortgagees had a right to enter and sever the fixtures, it not being competent to the tenant to defeat his grant by a subsequent voluntary act of sur-

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render: *London & W L. & D. Co. v. Drake* (1859) 6 C. B. N. S. 798.

If an incoming tenant purchase as fixtures from the outgoing tenant property which in fact belongs to the landlord, he may recover back the money he paid for it, in an action against the outgoing tenant for money had and received; and in such action it will be no defence that the outgoing tenant was not aware that the articles belonged to the landlord, having bought them himself from a preceding tenant; he, however, has his remedy against such preceding tenant: *Robinson v. Anderton* (1791) Peake, 94. But there is no implied warranty of title in the contract of sale of a personal chattel, the maxim being *caveat emptor*; and therefore, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct: *Morley v. Attenborough* (1849) 3 Exch. 500; *Ormrod v. Huth* (1845) 14 M. & W. 651, 664; *Burnby v. Bollett* (1847) 16 M. & W. 644; *Sims v. Marryat* (1851) 17 Q. B. 281. But slight evidence of a false warranty may be sufficient for a jury: *Snell v. Bickley* (1861) 2 F. & F. 56. Where the owner of the good-will and fixtures of a public house allowed another person to represent himself as such to the landlord, whereupon they let the house to him, and he sold the house and fixtures to a *bona fide* purchaser; it was held that the real owner of the fixtures had estopped himself from recovering the fixtures of the purchaser: *Gregg v. Wells* (1839) 10 A. & E. 90; *Pickard v. Sears* (1837) 6 A. & E. 469; *Freeman v. Cooke* (1848) 2 Exch. 654; 6 D. & L. 187; *Dunston v. Paterson* (1857) 2 C. B. N. S. 502; *Clarke v. Hart* (1858) 6 H. L. Cas. 633, 644, 655; *Waller v. Drakeford* (1853) 1 E. & B. 749; *Richards v. Johnson* (1854) 4 H. & N. 660; *Fletcher v. Fletcher* (1859) 1 E. & E. 422, 423.

## HIRE PURCHASE AGREEMENTS.

ARTICLE 129.—The Common Law Rule is that where chattels are delivered to a tenant under a hire-purchase—or a mere hiring—agreement to which the

landlord is not a party and by the tenant affixed to the freehold, they become part of the realty and the vendor or hirer is not entitled to the articles as against the landlord.

[Authorities: *Hobson v. Gorringe* [1898] 1 Ch. 182; *Reynolds v. Ashby & Son, Ltd.* [1903] 1 K. B. 87, [1904] A. C. 466; *Seeley v. Caldwell* (1918) 18 O. L. R. 472 [Teetzel, J.] and the cases hereinafter discussed].

This Article must be read with the Article 130 next following.

### *The English Cases.*

In *Hobson v. Gorringe* [1897] 1 Ch. 182; 66 L. J. (Ch.) 114, a gas engine was sold under a hire-purchase agreement providing it should not become the property of the purchaser until all the instalments were paid and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land. It was held, that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and consequently that it passed to the mortgagee as part of the freehold. And A. L. Smith, L.J., said, at p. 195: "That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor

has any authority to support this contention been adduced.”

In *Lyon v. London City and Midland Bank* [1903] 2 K. B. 135; 72 L. J. (K.B.) 465; 19 T. L. R. 334; 23 C. L. T. 184, the question was whether theatre chairs sold under an hire purchase agreement and affixed to the floor, in consequence of a by-law of the town council requiring them to be so affixed, became part of the freehold. The chairs were merely hired and although there was an option to purchase, that option was never exercised.

Joyce, J., said, p. 139: “Then the seats were complete in themselves and might have been used as seats without any annexation, though no doubt, apart from the requirements of the town council, it was better, considering the place where and the purpose for which they were used, that they should be screwed down to the floor. Further, the agreement under which these chairs were provided was not an ordinary hire-purchase agreement, and the case of *Hobson v. Gorringe* (*supra*) and other decisions have generally been treated as proceeding on the ground that the agreements under which the chattels were supplied were hire-purchase agreements. It is no doubt true that the agreement in the present case, though an agreement for hire only, contained an option of purchase; but that option was never exercised.”

This case was distinguished in *Reynolds v. Ashby* [1904] A. C. 466; 73 L. J. (K. B.) 946; 20 T. L. R. 766; 24 C. L. T. 330; 19 T. L. R. 70; 23 C. L. T. 21 [C.A.], where machines were supplied to the lessee of a factory upon the hire-purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could have been removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the prem-

ises who had taken possession; it was held, that the machines had been so fixed as to pass by the mortgage to the mortgagee.

Lord Lindley said, p. 474: "I pass now to consider whether in this case the fact that the mortgagor Holdway had not acquired the ownership of the machines, by paying for them, entitles the appellant to recover their value from the defendants. The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels. This was pointed out in *Gough v. Wood* [1894] 1 Q. B. 713; 63 L. J. (Q.B.) 564, and is very old law."

In *Ellis v. Glover & Hobson, Ltd.* [1908] 1 K. B. 388; 77 L. J. (K.B.) 251, Farwell, L.J., at p. 398, said: "If machinery is in fact affixed in such a manner as to become a fixture under a purchase or hiring agreement by which, as between mortgagor and vendor, it remained the property of the latter, the mortgagee can undoubtedly take possession of the machinery as part of his security, although not paid for, and although put up after the mortgage, and although the vendor had no knowledge of the existence of the mortgage: *Reynolds v. Ashby (supra)*."

#### *The Ontario Cases.*

*Seeley v. Caldwell* (1908) 18 O. L. R. 472, 12 O. W. R. 1245 [Teetzel, J.]. Mine machinery, including a tubular boiler, an air compressor, a receiver and a pump, etc., were delivered by the plaintiff to mine owners under an agreement to lease the same to them for one year at a rental of fifteen per cent. per annum of the cost. It was held that although all the articles could be attached at a trifling cost, they were so annexed to the freehold as to become part of it, and that the plaintiffs were not entitled to remove the same as against a mortgagee of the property: *Reynolds v. Ashby & Son, Ltd.* [*ante*, p. 871] and *Hobson v. Gorringe* [*ante*, p. 870] followed.

This case is opposed to *Lyon v. London City and Midland Bank* [*ante* 871].

*Manitoba.*

In *Andrews v. Brown* (1909) 19 M. R. 4; 11 W. L. R. 149; 29 C. L. T. 1079 [C.A.], the facts were that the plaintiff A. delivered to one M. a furnace to be paid for at a future date under an agreement in writing which provided that until paid for the property in the furnace should remain in A., who, in case of default, might detach the furnace and take it away. A.'s servants put the furnace into a house M. was building, affixing it to the freehold so that it became a part of the realty. B. purchased the house at a judicial sale to enforce a mechanic's lien and bought without notice of A.'s claim upon the furnace. It was held that the furnace had become part of the freehold, and that A.'s right to remove the chattel if not paid for could not be enforced against B., who was not bound either at law or in equity by M.'s contract: *Waterous v. Henry* (1884) 2 M. R. 169, and *Vulcan Iron Works Co. v. Rapid City Farmers Elevator Co.* (1894) 9 M. R. 577, overruled; *Hobson v. Gorringe* (*supra*), and *Reynolds v. Ashby* (*supra*) followed.

*Saskatchewan.*

In *The Berlin Interior Hardware Co. Ltd. v. The Colonial Investment and Loan Co.* [1918] 1 W. W. R. 378, it was held that the fact that opera chairs which were affixed, as intended to the floor of a theatre, were sold under a lien agreement—by which the title, ownership and right to possession of the property should remain in the vendor until the purchase price of the chairs was paid—did not prevent them becoming part of the freehold: *Hobson v. Gorringe* (*ante*); *Reynolds v. Ashby* (*ante*), and *Ellis v. Glover & Hobson Ltd.* [1908] 1 K. B. 388, followed; *Lyon v. London City, etc., Bank* [1903] 2 K.B. 135 (*ante*, p. 871) and *La Banque de Hochelaga v. Waterous Engine Works Co.* (1897) 27 S. C. R. 406, distinguished, the latter as being decided on the provisions of a section of the Code.

In the Berlin case the defendant company purchased the land upon which the theatre stood at a sale under proceedings upon a mortgage in default. It was held that it was not bound to search for liens or mortgages against goods which under the law had become part of the realty sold—in the absence of express notice it had a right to assume that everything affixed to the building passed with the building. The Lien Notes Act, R. S. S. 1909, c. 145, requires registration only as against “any purchaser or mortgagee of or from the buyer or bailee of the *goods* in good faith for valuable consideration.” The defendant was neither a purchaser nor a mortgagee of the goods.

*Alberta.*

*D’Auginey v. Brunswick-Balke Collender Co.* [1917] 1 W. W. R. 1331 [Alta., Walsh, J.], held “that as against a mortgagee who is not a party to it—the fact that the annexed articles were supplied under a hire-purchase agreement cannot be regarded as a circumstance to alter the *prima facie* character of these articles”: *Hobson v. Gorringe* (*supra*); *Reynolds v. Ashby* (*supra*) followed.

*British Columbia.*

*Hayward v. Lim Bang and Graham*, p. 875, *post*.

## THE STATUTES.

ARTICLE 130.—In Canada by statutory enactment where possession of goods is delivered to a tenant as purchaser or proposed purchaser or hirer of them in pursuance of a *contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it*, and the goods are by the tenant affixed to the demised premises, they do not become part of the freehold, and the rights of the seller or lender are not in any way affected by their being so

affixed: but if registration of any such contract is required by the law of any province and the contract is not registered, or is not registered within the required time, the owner loses the benefit of this enactment.

[Authorities: The Statutes hereinafter set out: *Seeley v. Caldwell* (1908) 18 O. L. R. 472; 12 O. W. R. 1245 [Teetzel, J.]; *Hayward v. Lim Bang and Graham* (1914) 19 B. C. R. 381; 27 W. L. R. 922; 6 W. W. R. 891 [B.C.—C.A.].

As the statutory provisions in the different provinces vary somewhat in terms, they are set out below and should be carefully studied. The change was made in Ontario in 1897; in New Brunswick in 1899; in British Columbia in 1904; in Nova Scotia in 1914; in Manitoba and Saskatchewan in 1915; and in Alberta in 1917. The sections will be considered in that order.

### *Ontario.*

The Ontario provision, now R. S. O. 1914, c. 136, the Conditional Sales Act, s. 9, reads as follows:

“Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them.”

This section was first enacted by 60 V. c. 14, s. 80, and passed into R. S. O. 1897, c. 149, as s. 10, which dealt with affixing the goods “without the consent in writing of the owner.” These words still appear in the Acts of New Brunswick and Nova Scotia.

Section 10 was also made retroactive, which it would not otherwise have been: *Berlin Interior Hardwood Co. Ltd. v. Colonial Investment and Loan Co.* [1918] 1 W. W. R. 378 [Sask.—Ct. en B.]. The section was repealed by

5 Edw. VII c. 13, s. 14, which substituted a section similar to the above—this passed into 1 Geo. V. c. 30, s. 9, and then into R. S. O. 1914, c. 136. Goods include “wares and merchandise”: s. 2.

It may be observed that this section is identical with the Saskatchewan provision.

The Act applies to goods “sold or hired—in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment”: s. 3 (1).

*New Brunswick.*

“Where any goods or chattels have been sold or bailed under any receipt, note, hire-receipt or other instrument by which it is agreed no ownership therein shall be acquired by the purchaser or bailee until payment of the purchase or consideration money or some stipulated part thereof [and where a copy of such receipt, note, hire-receipt or other instrument shall have been filed as is provided for by s. 2 of this chapter in regard to the writing therein mentioned], and such goods or chattels are affixed to any realty without the consent in writing of the owner of the goods and chattels, such goods and chattels shall not be or become part of the realty, but shall continue to be and remain personal property, and the rights of the owner or owners thereof shall not be in any way affected or altered by such goods or chattels being so affixed to the realty, but the owner,” etc., to same effect as in the Ontario provision.

The above section is s. 8 of the Conditional Sales Act, C. S. N. B. 1903, c. 143, which was amended in 1912 by 2 Geo. V. c. 30, adding the words in brackets.

This section was introduced into the Act in 1899 by 62 Vic. c. 12, s. 8 (1).

*British Columbia.*

“Should any goods subject to the provisions of this Act be affixed to any realty, such goods and chattels shall notwithstanding remain so subject and shall not be realty, but the owner of such realty or any purchaser or



any mortgagee or other encumbrancer on such realty shall have the right as against the manufacturer, bailor or vendor thereof, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon."

Sale of Goods Act, R. S. B. C. 1911, c. 203, s. 29.

This amendment to the system, introduced in 1892, requiring the registration of conditional sales, etc., for the protection of subsequent purchasers and mortgagees, without notice, in good faith for valuable consideration, "was passed (in 1904) as s.-s. (2) to R. S. B. C. 1897, c. 169, s. 25, to meet the decision of the Court of Appeal in *Reynolds v. Ashby & Son* [1903] 1 K. B. 87; 72 L. J. K. B. 51": per Irving, J.A., in *Hayward v. Lim Bang & Graham* (1914) 6 W. W. R. 891; 27 W. L. R. 922 [B.C.—(C.A.)].

#### *Nova Scotia.*

In 1914 the 4 Geo. V. c. 36, s. 1, added a provision similar to the one in New Brunswick, see p. 876, *ante*.

#### *Manitoba.*

Where any machinery, the subject of or affected by any receipt note, hire-receipt, or order for chattels mentioned in s. 2 of this Act, has been affixed to realty, it shall remain subject to the rights of the manufacturer, bailor or vendor, or person claiming through or under them, as fully as it was before being so affixed, but the owner of such realty, or any purchaser or any mortgagee or other encumbrancer thereof, shall have the right as against the manufacturer, bailor, or vendor, or other person claiming through or under them, to retain the machinery, upon payment of the amount owing on it.

(a) Nothing herein contained shall affect any machinery affixed to the realty and contained in any residence, tenement or apartment block.

This section was added to the Lien Notes Act, R. S. M. 1913, c. 115, in 1915, by 5 Geo. V. c. 38.

*Saskatchewan.*

The Saskatchewan provision added to the Lien Notes and Conditional Sales Act, R. S. S. 1909, c. 145, in 1915, is identical with the provision of the Ontario Act at p. 875, *supra*.

*Alberta.*

In 1917 the 7 Geo. V. c. 3, s. 32, added to the Conditional Sales Ordinance (44) as s. 4, a provision identical with the one in British Columbia, p. 876, *ante*.

*General View of the Statutes.*

The enactments should be considered with particular reference to the following matters:—

*The contracts affected.*—The statute only applies to contracts containing the special provisions as to ownership set out in the Article: *Seeley v. Caldwell*, p. 872, *ante*.

“*Without the consent in writing of the owner.*”—These words, as appears above, were dropped from the Ontario Act, but still appear in the Acts of New Brunswick and Nova Scotia.

*The goods remain personal property.*—This is expressly provided for in the Acts of New Brunswick and Nova Scotia only, but the Statutes of British Columbia and Nova Scotia expressly provide that the goods are not to become realty, and the effect of the Acts of the other provinces would seem to be the same.

*Registration or filing.*—All the Conditional Sales Acts, except that of Manitoba, require filing within a certain length of time: the Acts of New Brunswick and Nova Scotia also repeat the provision in the particular sections considered.

The fact that a conditional sale agreement does not comply with the Conditional Sales Ordinance (Alta.) does not disentitle the vendor from setting up a claim to the goods comprised in such agreement as against a landlord distraining for rent: *Re Osborne and Hudson's Bay Co.* (1915) 8 W. W. R. 821 [Alta.—Clarry, M.].

"Shall remain subject to the rights of the seller or lender."—This provision is common to all the Acts, as is the provision empowering the owner of the realty or any purchaser, mortgagor or other encumbrancer thereof to retain the goods upon payment of the price.

These enactments are not retroactive: *Berlin Interior Hardwood Co., Ltd. v. Colonial Investment and Loan Co.* [1918] 1 W. W. R. 378.

In *Theatre Amusement Co. v. Reid*, considered at length at p. 423 (*ante*), the question of distress in these cases is dealt with, and see generally *Re Hodges* [1917] 1 W. W. R. 317 [*Alta.*—Harvey, C.J.].

#### *Failure to File or Register.*

In *Hayward v. Lim Bang and Graham* (1914) 6 W. W. R. 891; 19 B. C. R. 381 [C.A.], Macdonald, C.J.A., said, "the contract was not so filed (under s. 29), and hence the appellants (vendors) get no assistance from the section. . . . It is unfortunate that they should suffer the loss of their goods, or their price, but that result has been brought about by failure on their part to observe the plain provisions of the Act."

Irving, J.A., said, at p. 892, that it was suggested "that we should apply the principle followed in *Chapman v. Edwards* (1911) 16 B. C. R. 334; 19 W. L. R. 266, 1 W. W. R. 59 [C.A.]; *Loke Yew v. Port Swettenham Rubber Co.* [1913] 3 A. C. 491, 82 L. J. P. C. 89, seems to support our decision, where the Judicial Committee laid down as a principle of general application, even where registration was compulsory, that where the rights of a third party do not intervene, no person can do that which it is not honest to do, and no person can enforce rights which formally belong to him only by reason of his own fraud. These cases are entirely different from that now under consideration. Here there is no suggestion of fraud."

"A subsequent notice cannot take the place of the registration, which must be made (in British Columbia) within twenty-one days of the first delivery: *Hayward v. Lim Bang and Graham* (*ante*).

## DOUBLE RENT.

ARTICLE 131.—Where a tenant gives notice of his intention to quit at a time mentioned in the notice, and does not deliver up possession accordingly, he shall from thenceforward pay double the rent or sum he should otherwise have paid.

Authorities: The Distress for Rent Act, 1737, 11 Geo. II. c. 19, s. 18 [Imp.] and the statutes noted under].

*The Imperial Statute.*

“In case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same time, and in the same manner as the single rent or sum before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.”

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 17.

Ontario: R. S. O. 1914, c. 155, s. 58.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 41.

The statute only applies to those cases where the tenant has the power of determining his tenancy by a notice: and where he has actually given a valid notice sufficient to determine such tenancy: *Johnston v. Huddlestone* (1825) 4 B. & C. 922; 7 D. & R. 411. It extends to parol demises from year to year: *Timmins v. Rowlinson* (1765) 3 Burr. 1603; 1 W. Blac. 533. If a tenant from year to

year give his landlord notice that he will quit upon a contingency, *e.g.*, "as soon as he gains another situation," and does not quit when the contingency happens, he is not liable to an action on the statute for double rent: *Farrance v. Elkington* (1811) 2 Camp. 591. The notice to quit mentioned in the statute need not necessarily be in writing; a parol notice is sufficient to enable the landlord to recover double rent: *Timmins v. Rowlinson* (*supra*). A tenant who has given notice and paid double rent may quit at any time without fresh notice, and thereupon his liability to double rent will cease: *Booth v. Macfarlane* (1831) 1 B. & Ad. 904.

The acceptance of single rent, which has accrued due subsequently to the notice, is, it seems, a waiver of the landlord's right to double rent, although it does not necessarily imply that the tenancy should continue: *Doe v. Batten* (1775) Cowp. 243.

By the above statute the double rent may be levied, sued for and recovered, at the same times and in the same manner as the single rent might have been levied, sued for and recovered before the giving of such notice. The mode of proceeding, therefore, to recover double rent under the statute is by distress: *Humberstone v. Dubois* (1842) 10 M. & W. 765; 2 Dowl. N. S. 506; or by action at law.

## DOUBLE VALUE.

ARTICLE 132.—If a tenant for life or years or any person who gets possession of premises under or by collusion with such tenant wilfully holds over the premises after the determination of the term and after the demand made and notice in writing given for delivery of possession, the person holding over shall for the time during which he holds over be liable to the person entitled to possession at the rate of double the yearly value of the premises.

[Authorities: The Landlord and Tenant Act, 1730: 4 Geo. II. c. 28, s. 1 [Imp.], and the statutes noted under].

*The Imperial Statute.*

“In case any tenant or tenants for any term of life, lives or years, or other person or persons, who are, or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case, such person or persons so holding over shall, for and during the time he, she, or they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his Majesty's Courts of Record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty there shall be no relief in equity.”

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 16.

New Brunswick: C. S. N. B. 1903, c. 153, s. 28.

Nova Scotia: Compare R. S. N. S. 1900, c. 173, giving a remedy in case of wrongful detainer.

Ontario: R. S. O. 1914, c. 155, s. 57.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 40.

*Wilfully Holding Over.*

The tenant must wilfully hold over, *i.e.*, contumaciously, and not merely by mistake, under a fair and rea-

sonable claim of title: *Wright v. Smith* (1805) 5 Esp. 203; *Soulsby v. Neving* (1808) 9 East, 310; *Poole v. Warren* (1838) 8 A. & E. 582; 3 N. & P. 693; *Swinfen v. Bacon* (1861) 6 H. & N. 184, 846; 30 L. J. (Ex.) 33. Whether his claim to hold over be *bona fide* or a mere pretence, is a question for the jury. A claim to hold over by virtue of a custom of the country which does not apply to the demised premises will not protect the tenant from liability to double value: *Hirst v. Horn* (1840) 6 M. & W. 393. Where a tenant held over possession during a treaty for a further term, which went off, it was held that the penalty in the statute did not apply: *Anon.* (1805) 5 Esp. 215. Where one of several tenants wilfully holds over without the assent of his co-tenants, the latter will not be liable: *Draper v. Crofts* (1846) 15 M. & W. 166; see also *Rands v. Clark* (1870) 19 W. R. 48.

Where a tenant held over and negotiated for an extension of his term for a year, and resisted proceedings on the ground of an agreement to extend the term: *Hodgins, J.A.*, held that while the parties had never been *ad idem*, the defendant was not "conscious that he had no right to retain possession"—following *Swinfen v. Bacon* (*supra*)—and that double value should not be given against him: *Dickson Co. v. Graham* (1913) 23 O. W. R. 749; 4 O. W. N. 670; 9 D. L. R. 813.

The tenants in *Nankin v. Starland* (1910) 15 W. L. R. 520 (Alta.) who held over thinking they had a right to a renewal for one year, which they had in fact lost by reason of a breach of covenant [see p. 970, *post*], were held not to be holding over wilfully or contumaciously and double damages were refused.

Where a tenant was ordered to give up possession [see *Osment v. Dundas* (1903) 7 Terr. L. R. 339, p. 780, *ante*], and appealed against the decision but did not perfect his appeal, it was held that he was holding over wilfully and contumaciously, and double damages were given against him: *Dundas v. Osment* (1906) 4 W. L. R. 116 [Newlands, J.]; (1907) 6 W. L. R. 86 [N. W. T.—Full Ct.].

See also *Isman v. Widen* [1920] 3 W. W. R. 766 [Sask.—C.A.].

*The Tenancies Affected.*

The wording is "tenant for any term of life, lives or years." It does not extend to weekly tenancies: *Lloyd v. Rosbee* (1810) 2 Camp. 453; nor, as it seems, to a tenancy from quarter to quarter: *Sullivan v. Bishop* (1826) 2 C. & P. 359; *Wilkinson v. Hall* (1837) 3 Bing. N. C. 508; 4 Scott, 301. It does apply to a tenancy from year to year: *Ryal v. Rich* (1808) 10 East. 48; *Lake v. Smith* (1805) 1 B. & P. N. R. 174.

It applies in the case of a lease for a year, even where there is a provision for termination on one month's notice, and it was so terminated before the expiration of the year: *Dundas v. Osment* (1905) 1 W. L. R. 363 [N. W. T.—Newlands, J.].

One tenant in common may maintain an action for the double value of his moiety: *Cutting v. Derby* (1776) 2 W. Blac. 1075; *Wilkinson v. Hall* (*supra*). But tenants in common cannot sue jointly for double value for holding over, unless there has been a joint demise: *Wilkinson v. Hall* (*supra*).

*Notice and Demand.*

The liability only arises on "demand made and notice in writing given" pursuant to the Act. The notice and demand may be served before the expiration of the term requiring the tenant to deliver up possession on the expiration of his term: *Messenger v. Armstrong* (1785) 1 T. R. 53; *Wilkinson v. Colley* (1771) 5 Burr. 2694; *Cutting v. Derby* (1776) 2 W. Blac. 1075; and in such case no further demand or notice is necessary after the expiration of the term, and the double value should be calculated from the expiration of the term for so long as the tenant holds over: *Id.*; *Soulsby v. Neving* (1808) 9 East, 310; *Wright v. Smith* (1805) 5 Esp. 203; *Booth v. Macfarlane* (1831) 1 B. & Ad. 904. Or the demand and notice may be given within a reasonable time after the expiration of the term, provided the landlord has done no act in the meantime to acknowledge the continuance of the tenancy, or rather to create a new one; and



he will thereupon be entitled to double value, calculated from the time of such demand, and not from the expiration of the tenancy: *Cobb v. Stokes* (1807) 8 East, 358. If the rent was before reserved quarterly, and such demand is made in the middle of a quarter, the landlord cannot recover the single rent for the antecedent fraction of such quarter: *Id.* And it would seem that the Apportionment Act does not affect the matter, as it appears to apply only during the term, and not on a holding over.

The demand and notice should always be given before, or as soon as possible after, the expiration of the term. When the tenancy was only from year to year, the usual written notice to quit is a sufficient demand and notice whereby to satisfy the statute, and no further demand or notice need be made after the tenancy has ceased: *Wilkinson v. Colley* (*supra*); *Cutting v. Derby* (*supra*); *Hirst v. Horn* (1840) 6 M. & W. 393; *Dundas v. Osment* (1906) 4 W.L.R. 116 [Newlands, J.]; (1907) 7 Terr. L.R. 342; 6 W.L.R. 86 [Full Ct.]. But the notice must amount to a valid and binding notice to quit: *Johnstone v. Huddleston* (1825), 4 B. & C. 922; and see the requisites of such a notice, p. 770 *et seq.* (*ante*). If it requires the tenant to quit on a wrong day, or on the right day, at twelve o'clock at noon, that is not sufficient: *Page v. More* (1850) 15 Q. B. 684. A notice requiring the tenant to quit on the proper day, "or I shall insist on double rent" (instead of double value), is sufficient, and does not give the tenant the option holding over: *Doe v. Jackson* (1779) 1 Doug. 75; *Doe v. Goldwin* (1841) 2 Q. B. 143. A second notice, given after the expiration of the term, to quit on a subsequent day, or to pay double rent, is no waiver of the first notice given before the expiration of the term, or of the double rent which has accrued under it: *Messenger v. Armstrong* (1785) 1 T. R. 53, 54. A notice to quit lands on a given day, "or at such time as your holding shall expire, next after the expiration of half a year from the receipt of this notice" is sufficient in an action for double value: *Hirst v. Horn* (1840) 6 M. & W. 393.

It is no answer to an action to recover double the yearly value of premises held over after notice to quit,

that subsequent to the notice, and while the tenant remained in possession, an agreement was made between him and the landlord to refer to arbitration a claim made by the tenant for improvements on the premises during the tenancy: *Hatheway v. McMahon* (1843) 4 N. B. R. 209.

The action of debt for double value given by the 4 Geo. II., c. 28, will lie, though the landlord has treated the tenant as a trespasser by bringing an ejectment against him, and a recovery of damages for use and occupation in such action will not be a bar to an action for double value under the statute: *Hamer v. Laing* (1855) 13 U. C. R. 233; *Soulsby v. Neving* (1808) 9 East, 310.

Double value cannot be distrained for, it not being in the nature of rent, but of unliquidated damages, recoverable only by action pursuant to the statute. After recovering the possession of demised premises by an ejectment, the landlord may maintain debt for double value for the time the tenant held over after the expiration of the notice to quit, until possession was obtained in the ejectment: *Soulsby v. Neving* (*supra*).

The action for double value "has no reference to any antecedent remedy which the landlord had to recover possession, but is cumulative. The two actions are brought *diverso intuitu*; the latter is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong": *Soulsby v. Neving* (*supra*); *Cutting v. Derby* (*supra*). It is to be observed that when the landlord gives notice, the penalty is double the yearly value; not double the yearly rent, which might not indemnify the landlord for the wrong": *Soulsby v. Neving* (*supra*). In estimating the double value, the value of power supplied by the owner of a mill by means of a revolving shaft, and let together with a room in the mill, cannot be included, such power not being "lands, tenements, or hereditaments": *Robinson v. Learoyd* (1840) 7 M. & W. 48.

If the amount sued for be within the jurisdiction of the County Court, the action may be brought therein:

*Blatchford v. Cole* (1858) 5 C. B. N. S. 514; and the defendant cannot oust the jurisdiction by alleging title to the premises in himself, if it be proved that he admitted a tenancy when the rent became due from which the holding over commenced: *Wickham v. Lee* (1848) 12 Q. B. 521.

Rent and double value are distinct causes of action, and may be sued for as such, notwithstanding statutory provisions as to dividing causes of action: *Id.*; *Ryal v. Rich* (1808) 10 East, 48.

The claim for double value may be asserted by way of counterclaim in a tenant's action for damages for detention of chattels [see 4 W. L. R. 116]; *Dundas v. Osmont* (1905) 1 W. L. R. 363 [N. W. T.—Newlands, J.].

## USE AND OCCUPATION.

ARTICLE 133.—If a tenant hold over under circumstances in which the landlord is not entitled to double rent or double value, the landlord may sue for use and occupation for the period for which the tenant holds over.

[Authorities: *Ibbs v. Richardson* (1839) 9 A. & E. 849; *Alford v. Vickery* (1842) C. & M. 280; *Lindsay v. Robertson* (1899) 30 O. R. 229, and the other cases noted at p. 339 (*ante*)].

The subject of Use and Occupation is dealt with in Article 45, p. 331 (*ante*).

## REMEDIES FOR RECOVERY OF POSSESSION.

ARTICLE 134.—Where a tenant holds over after the expiration of his lease, the landlord may [I] enter peaceably or forcibly into possession of the demised premises and eject the tenant as gently as possible; [II] maintain an action for possession of the premises in which he can obtain mesne profits, double rent, double value, arrears of rent or other relief; [III] eject the tenant in the summary manner permitted

by the various statutes passed in that behalf, in which case possession only can be obtained.

### *I. Peaceable Entry.*

Where a tenant holds over after the expiration of the term, the landlord has a right to take possession of the premises if he can do so without a breach of the peace: *Boulton v. Murphy* (1837) 5 U. C. Q. B. (O.S.) 731.

### *Violence after Peaceable Entry.*

It is clear law that if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the 5 Rich. II. Stat. 1, c. 8; *Edwick v. Hawkes* (1881) [50 L. J. (Ch.) 577, *sub nom. Edridge v. Hawker*] 118 Ch. D. 199.

“If a man enters peaceably into an house, but turns the party out of possession by force, or by threats frights him out of possession, this is forcible entry”: Bacon Abr. tit. Forcible Entry (B); *Hemmings v. Stoke Poges Golf Club* (1920) 89 L. J. K. B. 744; 1 K. B. 720.

### *Forcible Entry.*

#### *Premises Occupied.*

It was once held that the landlord could not acquire lawful possession by a forcible entry after the expiration of the term: *Newton v. Harland* (1840) 1 M. & G. 644; but this case has been overruled in *Hemmings v. Stoke Poges Golf Club* (1920) 89 L. J. (K.B.) 744, which also overruled *Beddall v. Maitland* (1881) 50 L. J. Ch. 401; 17 Ch. D. 174, and *Edwick v. Hawkes* (1881) [50 L. J. (Ch.) 577, *sub nom. Edridge v. Hawker*] 18 Ch. D. 199, so far as it followed those cases.

This decision is in line with the opinions expressed in *Harvey v. Bridges* (1845) 14 M. & W. 437; 14 L. J. (Ex.) 272; *Jones v. Chapman* (1849) 2 Exch. 803; 18 L. J. (Ex.) 456; *Davis v. Burrell* (1851) 10 C. B. 821, 825; *Pollen v. Brewer* (1859) 7 C. B. N. S. 371; *Scott v. Brown* (1884) 51 L. T. 746.

And it is now settled that a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and after civilly requesting the tenant to depart, may, in case of his refusal or neglect to comply with such request, gently lay hands upon him to turn or push him out; and in case of any resistance on his part, may use such force and violence as may be necessary to overcome such resistance (but no more), and so expel the tenant from the possession without being liable to an action of trespass, or for assault, at the suit of the tenant; although he may have made himself liable to an indictment for a forcible entry under the statutes: *Davison v. Wilson* (1848) 11 Q. B. 890; 17 L. J. (Q.B.) 196; *Burling v. Read*, *Id.* 904.

But excess of violence must be avoided, and that creates the principal difficulty and danger in proceeding to expel a tenant in the manner above mentioned, and often renders it more advisable to proceed by action of ejectment: *Cole Ejec.* 70, 71.

### *Forcible Entry.*

#### *Vacant Premises.*

If, at the expiration of the term, the tenant and his family have gone away from the house, and the house is locked up, no one being in possession, the landlord would be justified in breaking into the house forcibly and obtaining possession; and trespass *quare clausum fregit*, at the suit of the tenant, could not be maintained against him: *Turner v. Meymott* (1823) 1 Bing. 158; 1 L. J. (O.S.) (C.P.) 13; *Hillary v. Gay* (1833) 6 C. & P. 284; *Davison v. Wilson* (1848) 11 Q. B. 890; 17 L. J. Q. B. 196; *Burling v. Read* (1850) 11 Q. B. 904.

### *The Statutes of Forcible Entry.*

The Imperial Statute (1381) 5 Ric. II. st. 1, c. 7, provides that entry shall not be made with a strong hand or with a multitude of people, but only in peaceable and easy manner.

The Imperial Statute (1391) 15 Ric. II. c. 2, empowers justices to punish forcible entry.

The Imperial Statute (1429) 8 Hen. VI. c. 29, applied the earlier statute to both forcible entry and forcible detainer, and empowers the justices to cause the person turned out to be put back into possession.

See also (1588) 31 Eliz. c. 11 (1623) 21 Jac. I. c. 15.

The statutes would seem to be in force, so far as they are not superseded by our own legislation: *Boulton v. Fitzgerald* (1844) 1 U. C. R. 343; *R. v. McCreavy* (1837) 5 U. C. Q. B. (O.S.) 620; *Napier v. Ferguson* (1878) 18 N. B. R. 255.

### *The Criminal Code.*

By the Criminal Code, R. S. C. 1906, c. 146, s. 102: "Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another."

"Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof."

What amounts to actual possession or colour of right is a question of law.

By s. 103, every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

R. S. N. S. 1900, c. 173, also deals with Forcible Entry and Detainer.

### *What is Forcible Entry.*

The plaintiffs, man and wife, lived in a cottage owned by a Golf Club by whom the man was employed, in which the man performed certain of his duties. He left the service of the club but refused to leave the cottage. The club by its agents entered and removed the plaintiffs and their furniture, using no more force than was necessary and doing no more material damage than was necessary.

The plaintiff sued the club for trespass, assault and battery. The defendants admitted that the entry was forcible within the meaning of the statute of Richard (although Bankes, L.J., seemed to incline to the opinion that it was not—drawing a distinction between the case of a person occupying as a servant and a person occupying as tenant), but justified under the facts stated. The defendants' right to possession of the cottage was held to be a good defence to the action: *Hemmings v. Stoke Poges Golf Club* (*ante*).

The lessee of a cottage, on the expiration of his tenancy, wrongfully refused to give up possession. The lessor, who was desirous of rebuilding, sent some workmen to remove the roof, and in the course of such removal, which was effected without any personal violence, certain tiles and other portions of the roof unavoidably fell on the lessee's furniture in the room below, and damaged it, and it was held that the lessee was not entitled to sue for trespass to the furniture, the facts not showing a forcible entry: *Jones v. Foley* [1891] 1 Q. B. 730; 60 L. J. (Q.B.) 464.

### *Wrongs Accompanying Forcible Entry.*

For any independent wrong, such as an assault or injury to furniture committed in the course of a forcible entry, damages can be recovered by the person injured: *Beddall v. Maitland* (1881) 17 Ch. D. 174; 50 L. J. (Ch.) 401; *Beattie v. Mair* (1882) 10 L. R. Ir. 208.

In *Russell v. Murray* (1901) 34 N. S. R. 548, the trial Judge found that although the landlord making an entry had technically violated the plaintiff's right of possession, the latter was retaining possession in violation of good faith, and that her evidence as to the circumstances of her removal was untrue. It was held that the trial Judge was justified in depriving her of her costs: following *Rice v. Ditmars* (1888) 21 N. S. R. 140.

### *II. Actions for Recovery of Land.*

The action of ejectment was a "mixed" action to recover possession of land and damages and costs for

the wrongful withholding. The many fictions accompanying this action were abolished by the Common Law Procedure Act of 1852, which substituted a simple writ claiming the land sought to be recovered, but did not allow pleadings. By the Judicature Act of 1873, the name of the action was changed to "Recovery of Land."

The practice and procedure in such actions is not within the scope of these notes. The reader is referred to 12 Encyc. Laws of England pp. 449 *et seq.*

### *Limitation of Actions for Possession.*

The [Real Property] Limitations Acts of the various provinces are taken from the Imperial Real Property Limitations Act (1833) 3 & 4 Wm. IV. c. 27, as amended by the Real Property Limitation Act (1874) 37 and 38 Viet. c. 57.

By s. 9 of the Act of 1874, that Act is to be read with 3-4 Wm. IV. c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

The North-West Territories Consolidated Ordinance (1898) c. 31, s. 2, in force in Alberta, provides that the provisions of the Real Property Limitation Act, 1874 [37-38 Viet. c. 57], are hereby declared to be in force and to have been in force in the Territories since the passing thereof.

In Saskatchewan the R. S. S. 1909, c. 50, s. 2, is a re-enactment of C. O. 1898, c. 31, s. 2.

Therefore the law in Alberta and Saskatchewan is the same as in England.

### *Land or Rent.*

The Ontario Limitations Act, R. S. O. 1914, c. 75, s. 5, provides:—

"No person shall make an entry, or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right



did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.”

[10 Edw. VII. c. 34, s. 5; R. S. O. 1897, c. 133, s. 4; R. S. O. 1887, c. 111, s. 4.].

### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 2; [20 years] repealed by 37-38 Vict. c. 57, s. 1 [12 years].

Alberta: see p. 892 (*ante*).

British Columbia: R. S. B. C. 1911, c. 145, s. 16. [20 years].

Manitoba: R. S. M. 1913, c. 116, s. 4.

New Brunswick: C. S. N. B. 1903, c. 139, s. 3.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 9. [20 years].

Saskatchewan: see p. 892 (*ante*).

The accrual of the right is defined in the following sections, which treat—

- (1) Of Dispossession.
- (2) Of Death.
- (3) Of Alienation.
- (4) Of the wrongful receipt of rent reserved by lease in writing.
- (5) Of Tenancies from year to year.
- (6) Of Tenancies at will.
- (7) Of Mortgagors and *cestuis que trustent*.
- (8) Of Forfeiture and Breach of Condition.

The Ontario Act, R. S. O. 1897, c. 133, s. (1), contained the following:—

“In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned.”

This provision was dropped in 1910, 10 Edw. VII. c. 34, s. 4. The following sections supply the omission.

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 3 (part).

Alberta: See p. 892 *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 17 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (1).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (part).

Saskatchewan: See p. 892, *ante*.

*On Dispossession.*

“Where the person claiming such land or rent or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were so received.”

[R. S. O. 1914, c. 75, s. 6 (1); 10 Edw. VII. c. 34, s. 6 (1), and R. S. O. 1897, c. 133, s. 5 (1); R. S. O. 1887, c. 111, s. 5 (1)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 3.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 17 (part).

Manitoba: R. S. O. 1913, c. 116, s. 5 (a).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (a).

Saskatchewan: see p. 892, *ante*.

*On Death.*

“Where the person claiming such land or rent claims the estate or interest of a deceased person who continued in such possession or receipt, in respect of the

same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, such right shall be deemed to have first accrued at the time of such death."

[R. S. O. 1914, c. 75, s. 6 (2); 10 Edw. VII. c. 34, s. 7 (2); R. S. O. 1897, c. 133, s. 5 (2); R. S. O. 1887, c. 111, s. 5 (2)].

### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 3.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 17 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (b).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (b).

Saskatchewan: see p. 892, *ante*.

### *On Alienation.*

"Where the person claiming such land or rent claims in respect of an estate or interest in possession, granted, appointed or otherwise assured by an [assurance] to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such [assurance] has been in possession or receipt, such right shall be deemed to have first accrued at the time at which the person so claiming, or the person through whom he claims, became entitled to such possession or receipt by virtue of such [assurance]."

[R. S. O. 1914, c. 75, s. 6 (3); 10 Edw. VII. c. 34, s. 6 (3); R. S. O. 1897, c. 133, s. 5 (3); R. S. O. 1887, c. 111, s. 5 (3)—"assurance" meaning instrument other than a will].

### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 3.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 17 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (c).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (c).

Saskatchewan: See p. 892, *ante*.

*As to Lands not Cultivated or Improved.*

“In the case of land granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some part thereof, and of which some other person not claiming to hold under such grantee has been in possession, such possession having been taken while the land was in a state of nature, then unless it is shewn that such grantee or person claiming under him while entitled to the land had knowledge of the same being in the actual possession of such other person, the lapse of ten years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken.”

[R. S. O. 1914, c. 75, s. 6 (4); 10 Edw. VII. c. 34, s. 6 (4); R. S. O. 1897, c. 133, s. 5 (4); R. S. O. 1887, c. 111, s. 5 (4)].

*Where Rent Reserved by Lease in Writing has been Wrongfully Received.*

“Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of \$4 or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the per-

son entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person so wrongfully claiming, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

[R. S. O. 1914, c. 75, s. 6 (5); 10 Edw. VII. c. 34, s. 6 (5); R. S. O. 1897, c. 133, s. 5 (5); R. S. O. 1887, c. 111, s. 5 (5)].

### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 9.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 23.

Manitoba: R. S. M. 1913, c. 116, s. 5 (*d*).

New Brunswick: C. S. N. B. 1903, c. 139, s. 10.

Saskatchewan: See p. 892, *ante*.

### *Tenancy from Year to Year.*

"Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received, whichever last happened."

[R. S. O. 1914, c. 75, s. 6 (6); 10 Edw. VII. c. 34, s. 6 (6); R. S. O. 1897, c. 133, s. 5 (6); R. S. O. 1887, c. 111, s. 5 (6)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 8.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 22.

Manitoba: R. S. M. 1913, c. 116, s. 5 (*e*).

New Brunswick: C. S. N. B. 1903, c. 139, s. 9.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (*g*).

Saskatchewan: See p. 892, *ante*.

*The Case of a Tenant at Will.*

“Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.”

[R. S. O. 1914, c. 75, s. 6 (*g*); 10 Edw. VII. c. 34, s. 6 (*g*); R. S. O. 1897, c. 133, s. 5 (*g*); R. S. O. 1887, c. 111, s. 5 (*g*)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 7.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 21.

Manitoba: R. S. M. 1913, c. 116, s. 5 (*f*).

New Brunswick: C. S. N. B. 1903, c. 139, s. 8.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (*f*).

Saskatchewan: See p. 892, *ante*.

Tenancies at Will are considered at pp. 203, *et seq.* (*ante*).

In *McCowan v. Armstrong* (1902) 3 O. L. R. 100; 22 Occ. N. 65, Meredith, C.J.C.P., said at p. 105: “Had the testator made an entry sufficient to put an end to the tenancy at will within eleven years before the commence-

ment of the action, it would not have availed to stop the running of the statute against him unless it was also shewn that a new tenancy had been created before the statute had operated to extinguish his right and title: *Doe d. Dayman v. Moore* (1846) 9 Q. B. 555, per Patteson, J., at p. 558; *Doe d. Goody v. Carter* (1847) *id.* 863; *Day v. Day* (1871) L. R. 3 P. C. 751. . . . According to these authorities, if the tenancy at will was determined, upon the expiration of it the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped unless, before it had operated to extinguish the right and title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of s.-s. 7 of s. 5. Although at one time it appeared to have been thought that the effect of s.-s. 7 was to put an end to a tenancy at will for all purposes at the latest at the expiration of a year from the time when it began, that is not now, I think, the law: the more correct view is, and it is to be taken to be the law, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be so then determined." [See p. 906.]

This case was referred to by Garrow, J.A., in *Noble v. Noble*, where the question again came up.

In *Noble v. Noble* (1912) 25 O. L. R. 379; 20 O. W. R. 889; 3 O. W. N. 519 [Div. Ct.], Boyd, C., said (at p. 385): "The legal effect of the Statute of Limitations when one is let into possession of land, as in this case, is that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the tenancy is regarded as a tenancy at sufferance unless evidence be given that a fresh tenancy has been created."

This view, however, is dissented from in the Court of Appeal, S. C. (1912) 27 O. L. R. 342; 4 O. W. N. 359; 9 D. L. R. 735, Magee, J.A., saying, at p. 349: "With much respect, I venture to think that the case is here treated by the Divisional Court as if the Statute of Limitations actually determined the tenancy at will in one

year, and this rendered the creation of a fresh tenancy at will possible and for the plaintiff necessary. Therein, as I think, lies the whole question, for if the statute did not determine it, there is not a suggestion of any other act of the parties or fact which would operate as a determination or indicate that the original tenancy at will was ever put an end to before April 1st, 1906, or thereafter if it continued to be a tenancy at will until the son's death. . . . The statute, of course, has no such effect, as to terminate the tenancy at the end of the first year, and the Divisional Court did not say that it had, but that Court did proceed to infer that the parties had in fact acted as if that was its effect, and had from year to year created a fresh tenancy as often as the statute ended the previous one, and in effect thus made eleven successive tenancies in theory, where there was only one in fact. The statute, however, contemplates that a tenancy at will created eleven years before action may have continued the whole time, and yet, if the landlord has neither received rent nor obtained a written acknowledgment his rights will be barred. If there has been a determination in fact of the tenancy, that does not stop the statute running if the tenant continues in possession, but it leaves it open to the jury or court to find that, after such determination, a new tenancy at will was in fact created by the parties, and so a new starting-point gained by the landlord. But this fresh tenancy presupposes the ending of the previous one in some way; and, if that has not been ended, there is no new one. True the acceptance of a new tenancy might, in a proper state of facts, imply the surrender of the old one, but that would require very clear evidence, of which there is here an entire absence."

A father desiring to provide a home for his son purchased a house and grounds, and on the 1st April, 1895, with his permission, the son and his wife took possession. They remained in undisturbed possession with his consent until April, 1907, when the son became insane and was removed to an asylum, where he remained until he died intestate. When he was removed to the asylum his



wife continued to occupy the premises as a home, remaining in possession until the 30th May, 1908, when the property was rented to a tenant by the father, acting for the widow. The tenant occupied from the 17th June, 1908, to the 17th October, 1909, when he vacated, giving the key to the widow, who about a month thereafter resumed possession. The father, who had mortgaged the lands at the time of purchase to secure part of the purchase price, paid the interest from 1895 to 1910, when he paid off the mortgage and took a statutory discharge, which was duly registered on the 11th of January, 1911. The son or his wife paid no rent and in no way recognized the father's title. It was held by Mulock, C.J.Ex.D. (1911) 20 O. W. R. 168; 3 O. W. N. 146, that the son on taking possession became a tenant at will of the plaintiff: *Keffer v. Keffer* (1877) 27 U. C. C. P. 257; and that the statute began to run in his favour at the expiration of one year, namely, on the 1st April, 1896, and that the father was barred on the 1st April, 1906, and that the execution and registration of the discharge did not give a new starting point to the statute: *Noble v. Noble* (1911) 25 O. L. R. 379; 20 O. W. R. 889; 3 O. W. N. 519. He was reversed by a Divisional Court (S.C.), but on appeal his judgment was restored by the Court of Appeal (1912) 27 O. L. R. 342; 4 O. W. N. 359; 9 D. L. R. 735 [C.A.].

In *Foster v. Emerson* (1854) 5 Gr. 135, a "very strong court" [Blake, C., Spragge, V.C., Esten, V.C.] in a "very carefully considered decision" [see per Boyd, C., 25 O. L. R. 385], held in effect that if the occupancy was shewn to be within the then period of twenty years that of tenant at will the statute would not take effect; and this apparently whether the occupancy was under a continuing tenancy twenty-one years old or under a fresh tenancy within twenty-one years. The Divisional Court in *Noble v. Noble* followed this decision, holding that the acts of the son and his widow amounted to an admission that during the period in question they were in fact tenants to the father. *Doe d. Groves v. Groves* (1847) 10 Q. B. 486, relied upon in *Foster v. Emerson*, was also approved by Boyd, C., in *Noble v. Noble*.

The Divisional Court also distinguished *Keffer v. Keffer* (1877) 27 U. C. C. P. 257, upon which the trial Judge relied.

In that case a father told his son, then over 22 years of age and married, to go and live on a certain lot and make a living there. The son entered into possession and erected buildings and spent money in improvements, the land being assessed in his name and the taxes paid by him. The father never made any demand of possession nor claim of rent for seventeen years, when the son refused to pay anything, claiming the land as his own. The father intended that it should be the son's after his death, though he did not so inform him. Some years after the occupation commenced, the son procured his father to execute a mortgage on the lot for the son's benefit, he undertaking to pay it off, which was afterwards done. The Court held that on entry the son became a tenant at will, and that the Statute of Limitations began to run in one year from that time; that, as a matter of fact, neither party intended to make any change when the mortgage was executed, or to create any new tenancy; that the existing tenancy at will, therefore, was not determined by the mortgage; and even if a new tenancy had been created, the statute would have begun to run again in one year after the execution of the mortgage, and that the father's right was barred by the ten years' limitation of the R. S. O. (1887) c. 111, s. 4; s. 5 (7).

In *Noble v. Noble*, p. 899, *ante*, Magee, J.A., followed *Keffer v. Keffer* (*ante*), and said [p. 351] of *Foster v. Emerson*: "It is questionable if such a conclusion was necessary in that case. . . . But whether necessary or not, it was not warranted by any of the cases quoted as supporting it and was contrary to some which the court cited without disapprobation and to the Act itself." He then considered *Doe d. Grove v. Grove* (*supra*) and continued: "The decision, therefore, does not warrant the conclusion drawn from it in *Foster v. Emerson*," and pointed out that *Doe d. Bennett v. Turner* (1840) 7 M. & W. 226, and *Turner v. Doe d. Bennett*

[the same case on a new trial] (1842) 9 M. & W. 643; both cited in *Foster v. Emerson* and by the Divisional Court in *Noble v. Noble*, did not support *Foster v. Emerson*, but were opposed to it. The learned judge then summed up, saying, p. 352: "It is clear, I think, that if the judgment of the Divisional Court proceeded upon the basis of the statute not taking effect because Frank Noble [the son] continued to be in possession up till the 1st April, 1906, as tenant at will under the original tenancy, it is not in accordance with the statute or the authorities; and if it proceeded upon the basis of an assumed finding of any surrender or determination of the original tenancy and creation of a new tenancy before the 1st April, 1906, and within eleven years, it is not supported by any evidence."

A. entered into possession of land in 1833, and in 1834 made an agreement to purchase it from B., the owner, the purchase money being payable by instalments with interest, the last of which would fall due in 1839, when a deed was to be given. Nothing was said in the agreement about possession or the right to it, and A. continued to hold for more than twenty years without making any payment. It was held that he was only tenant at will, and that the will determined at the expiration of a year from the execution of the agreement: *Jones v. Cleaveland* (1857) 16 U. C. R. 9.

Where the tenant encroaches on or incloses land of the lessor not included in the lease, with the verbal assent of the latter, the lessee will not become tenant at will, so as to make the Statute of Limitations run against the lessor: *Whitmore v. Humphries* (1871) L. R. 7 C. P. 1; 41 L. J. (C.P.) 43; and *City of Toronto v. Ward* [p. 814, *ante*].

T. P. put C. in possession of land to hold for him and keep trespassers off, with liberty to cut the grass and firewood upon it. C. held it until his death in 1821, nearly thirty years, but never claimed it as his own. On the death of C., his son, D., succeeded to the possession, and continued to hold the land as his father had done till T. P.'s death, and afterwards for W. P., the son and

one of the heirs of T. P., until 1844, when he conveyed it to C. P., a son of W. P., under whom the plaintiff claimed by a deed dated in 1886. The defendant claimed under J. P., a grandson and one of the heirs of T. P., who entered on the land after the conveyance to C. P. in 1844. It was held that C. was not a tenant for years to T. P., subject to a rent service, but at most a tenant at will, and that such tenancy terminated at his death in 1821, that the holding by D. created a new tenancy at will between him and the heirs of T. P., which terminated in 1823, and that at the expiration of twenty years therefrom the right of T. P.'s heirs was barred, and D. had the fee simple: *Peters v. McGloyn* (1858) 9 N. B. R. 189.

*Evidence Necessary to Shew the Creation of a New Tenancy at Will.*

The question then arises what evidence is required to shew the creation of a new tenancy?

Very clear evidence is required: see per Magee, J.A., in *Noble v. Noble*, ante p. 899 [2 O. L. R. at p. 350], quoting with approval the language of the Privy Council in *Day v. Day* (*supra*): "The language and the policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will, a pronouncement which Channell, J., hesitates to accept in *Jarman v. Hale* [1899] 1 Q. B. 994, in which case, however, there was an actual determination."

A tenant at will without interruption for more than the statutory period, during which he let and transferred portions of the land with knowledge and without the interference of the owner of the fee, was held to acquire an undefeasible title: *Day v. Day* (1871) L. R. 3 P. C. 751.

An entry upon land under assertion of right and a verbal submission by the occupant and consent to remain as tenant to the owner creates a new tenancy at will, and

gives a fresh point of departure under the Statute of Limitations: *Smith v. Keown* (1881) 46 U. C. R. 163; *In re Defoe* (1882) 2 O. R. 623; *Cooper v. Hamilton* (1881) 45 U. C. R. 502. But where a purchaser entered under a contract of sale and occupied for twenty-one years and received the rents and profits, it was held that he had become the owner and could not be ejected, as the statute determines the tenancy at the expiration of one year from its commencement, and the possession afterwards was adverse: *Purdy v. Peters* (1838) 2 N. B. R. 530.

This case must be read in the light of the decision in *McCowan v. Armstrong* [*ante*, p. 898].

In *Cobean v. Elliott* (1906) 11 O. L. R. 395; 7 O. W. R. 13; 7 O. W. R. 495, considered at p. 208 (*ante*), a testator dying in 1873, by will dated the 28th May, 1873, devised land of which E., his brother, had been in possession since 1848 to his, the testator's son, after the death of his brother, to whom he devised a life estate "on condition that he neither sells nor rents the same without consent in writing of my son." E. continued in possession and on the 1st April, 1895, leased the land for one year without the consent of his nephew. In an action begun on the 29th May, 1905, it was held that as E. had actively and openly violated the condition imposed by the will, he could not be considered to have accepted the devise: that the statute was a bar to the action and that as E. went into possession as tenant at will the statute had run in his favour before the death of the testator. The argument that by accepting the devise E. had obtained a new tenancy was based upon *Re Denham* (1881) 29 Gr. 258, and *In re Defoe* (*ante*)—but these cases were distinguished on the ground that E. had not remained passive as the claimant in those cases, but had actively, openly violated the provisions of the will.

The question was discussed in *Ryan v. Ryan* (1880) 5 S. C. R. 387 [see also 29 U. C. C. P. 449; (1880) 4 A. R. 563]. The claimant went into possession as his father's caretaker and agent, and within the seven years before the trial had undertaken to give up possession whenever required to do so by his father. The occasion

of this promise was when his father's agent had called to remove him because he had allowed timber to be taken off the land. The court pointed out that the claimant was not in possession as tenant at will unless he became such by reason of the new agreement, but discussed *Day v. Day* and *Keffer v. Keffer* (*supra*), and held that in either event he was not entitled to succeed.

See also *Henderson v. Henderson* (1896) 23 A. R. 577 [C.A.], reversing 27 O. R. 93 [Div. Ct.].

A son entered into possession of one of his father's farms in 1879, and remained in possession without paying rent or rendering any service or return or acknowledging his father's title. He made valuable improvements, and although his father came to visit him for periods, and the farm was assessed in the name of the father as "owner" in 1879 and 1880, and in the names of them both as "freeholders" from 1880 to 1889, it was held there was no evidence of entry by the father or to support the creation of a new tenancy at will: *Doe d. Bennett v. Turner* distinguished. It was also held that an agreement entered into by the son with the devisees and legatees of his father's will—which left the land in question to him charged with a legacy—to abide by the terms of the will, was not binding upon him as he did not know the terms of the will — by which he had reasonable grounds to believe he would be given the farm—or his rights under the statute: *McCowan v. Armstrong* (1902) 3 O. L. R. 100 [Meredith, C.J.C.P.].

"If you find a definite acknowledgment from the tenant that he is holding by permission of the other, that is all you want": per Channell, J., in *Jarman v. Hall* [1899], 1 Q. B. 994, at p. 999.

The question of assessment of the lands in the name of the tenant and the payment of taxes is also discussed in *Brennan v. Finley* (1905) 9 O. L. R. 131; 5 O. W. R. 251, already noted at p. 269, *ante*; *Noble v. Noble*, p. 899 (*ante*), and *Finch v. Gilray*, p. 269 (*ante*).

In *East v. Clarke*, already considered at pp. 203 and 270 (*ante*), it was held that as the payment of taxes had been made under an express agreement to pay them as

rent, they were really paid as rent within the meaning of the statute, and so the statutory bar did not accrue: so distinguishing *Finch v. Gilray* (*supra*). It was also held that although nothing is said in s. 6, s.s. 7, about the effect of payment, the law attributes to the payment of rent in the case of a tenancy at will the effect of a similar payment under s. 6, s.s. (6), following *Day v. Day* (*ante*, p. 904).

*Noble v. Noble* (*ante*) was distinguished in *East v. Clarke* [see p. 270 *ante*]. There W. E., in 1892, conveyed the land in question to D., the conveyance being by way of security. In October, 1913, D.'s executors conveyed to the plaintiff, the wife of W. E. The tenant went into possession in 1896. It was held D. was in the same position as a mortgagee, and while his title was outstanding and payments being made, the statute was inoperative against him or the plaintiff claiming under him: see s. 23.

Garrow, J.A., at p. 633, points out that in the *Noble* case, the mortgage was discharged after the mortgagor's title had been extinguished. "The conveyance (here) was made by and with the consent of her husband, the mortgagor; but that cannot, I think, affect the legal result, which is, in my opinion, to entitle her to say that she claims under the mortgage within the meaning of the cases referred to in *Noble v. Noble*, at p. 347 [27 O. L. R.]."

In *Iredale v. Loudon* (1908) 40 S. C. R. 313, reversing the Ontario Court of Appeal (1907) 15 O. L. R. 286; 10 O. W. R. 725, and restoring, with a modification, the judgment of Mabee, J., at the trial (1907) 14 O. L. R. 17, 8 O. W. R. 963, it was held that possession of an upper room in a building supported entirely by portions of the storey beneath may ripen into title thereto under the provisions of the Statute of Limitations. This case is referred to at p. 204 (*ante*). Davies, J., held the right of support and use of the staircase was a proprietary right following as a necessary incident of the land to which it was attached. Idington, J., and Maclellan, J.A., dissenting, held that no right had been acquired to use of

the stairway by which the room was reached. Duff, J., Fitzpatrick, C.J., concurring, held that the defendant should be restrained from demolishing so much of the structure as rested upon the part of the soil to which the tenant had acquired possessory title.

Payment of part of the purchase money by a person in possession, under an agreement to purchase land, is a renewal of the tenancy at will so created [as to which see p. 207, *ante*], and the statute begins to run from the date of such payment. An oral admission from such a person that he is holding as tenant at will to the vendor will not prevent the statute running against such vendor: *Anderson v. Anderson* (1906) 37 N. B. R. 432; 1 E. L. R. 443.

In this case it was also held that as between the vendor and vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee in possession, the vendor is entitled to the protection afforded mortgagees by C. S. N. B. 1903, c. 139, s. 30, and his right of entry is not extinguished for twenty years after the last payment of principal or interest.

*Bowman v. Watts* (1909) 13 O. W. R. 481 (Div. Ct.) D., an employee of the defendant, was allowed to take possession of some property in 1870, occupying in part payment for his services and agreement to pay taxes. From 1874 he was assessed as owner. About 1888 he quit working for the defendant but remained in possession until his death, intestate, in 1899. His widow remained in possession until 1902. Shortly after his death she conveyed all her interest to the plaintiff. It was held that as since 1888, or at the latest 1889, the only return D. made for the use of the land was to pay taxes, and this, on the authority of *Finch v. Gilray* (*ante*) was not a payment of rent such as was requisite to prevent the statute running in his favour, he had acquired a title to the lands, before his death. It was also held that a conversation in which D.'s wife arranged that so long as the defendant did not need the house and she paid taxes she might live in it, was not an acknowledgment of the defendant's title; to hold otherwise would render nugatory the requirement of the statute.



In *Calverley v. Lamb* (1907) 10 O. W. R. 279, Riddell, J., said, at p. 282: "As at present advised, I think that where a claim is made to property under the Statute of Limitations, it is incumbent upon the person so claiming to prove affirmatively the non-payment of rent. . . . [Reference to s. 5]. I think the person claiming by the statute must, as part of his case, prove that the last time when any rent payable in respect of such tenancy was received was ten years before the *teste* of the writ. Some support is found for this proposition in the judgment of Malins, V.C., at p. 290 of *In re Allison* (1879) 11 Ch. D. 284. I do not find a decision on this point, though there are some cases as *e.g.*, *Doe dem Spence v. Beckett* (1843) 4 Q. B. 601, in which the plaintiff actually did prove affirmatively that the rent was paid."

In *Chisolm v. Norwood* (1907) 2 E. L. R. 149 [N.B.—McLeod, J.], the plaintiff failed because she had no title to the property, and also it was found that she did not lease the premises to the defendant, who was tenant of the third party.

In *Sullivan v. Sweeney* (1908) 4 E. L. R. 492 [P.E.I.—Fitzgerald, J.], the occupant paid the civic taxes under an agreement with the owner of the lands. It was held, distinguishing *Finch v. Gilray* and *Davis v. McKinnon* (*supra*), that on the terms of the agreement the taxes were expressly paid as rent. This view of the matter was confirmed by the fact that under the Act imposing the taxes the tenant was under no liability to pay any taxes whatever on the premises. The tenant's claim to title by possession therefore failed.

J. purchased land and went into possession in 1878. He mortgaged it in 1879, and in 1880 conveyed the equity of redemption to B. without consideration. In 1887, and within twenty years of the commencement of this action, J. requested S. to pay off the mortgage, which S. did, taking an assignment of the mortgage. B. then, at J.'s request, conveyed the equity of redemption to S. J. continued in possession without paying any rent or anything on account of the mortgage. It was held J. was tenant at will to S., and that an action brought by S. to

recover possession was not barred by the statute: *Stevens v. Jeffers* (1908) 38 N. B. R. 233; 3 E. L. R. 471.

The tenant was in possession of land as caretaker or tenant at will. The owner put his cattle on the land during such possession. It was held that the produce of the land eaten by the cattle was "profit" which the owner thus took to himself, and so long as the cattle were upon the land the defendant was not in exclusive occupation, and the statute did not begin to run in his favour: *Rennie v. Frame* (1896) 29 O. R. 586 [Rose, J.].

A mere visit by the owner (during childhood) to the occupant of the land (his aunt), was held not to be an entry—even if the occupant then acknowledged his title: *Brock v. Benness* (1898) 29 O. R. 468 [Street, J.].

In *Coulter v. Rockwell* (1905) 6 O. W. R. 537 [Anglin, J.], found on the evidence that the plaintiff—who had been assessed as owner throughout the whole period during which the defendant had claimed to occupy—was in possession, and further that the defendant had entered into a new tenancy as late as 1898. He also gave judgment for arrears of rent limited by R. S. O. 1897, c. 72, s. 1 (a) to arrears for the period commencing 8th October, 1899.

In *Dodge v. Smith* (1902) 3 O. L. R. 305; 1 O. W. R. 46 [Div. Ct.], it appeared that one M. had acquired title as against D., the holder of the paper title prior to 1884. In that year D. executed and delivered to M. a conveyance of the lands reserving thereout the mines and minerals. M. did not execute the deed, but did execute a mortgage to D. of the lands, excepting the mines "which the said mortgagor has no claim to." At the trial Lount, J., found M. had acquired title to the lands before 1884, but that he was estopped by the reservations in the deed and mortgage from claiming title to the mines and granted an injunction restraining M. from interfering with D.'s successors in title and from working the mines. The Divisional Court reversed this judgment, holding that when D. reserved the mines he reserved something which he did not own, because his title to it had already become barred by the statute, and it was plain that the reservations did not operate as a grant from M.

But evidence was allowed to be given on behalf of the plaintiff on the appeal: see (1902) 1 O. W. R. 803. The case in appeal is reported in (1903) 2 O. W. R. 561; 40 O. L. R. 362 [C.A.] (not reported until 1917, when only a note of the result was made). Upon new evidence admitted on appeal, it was held that M. was a tenant paying taxes and rent, who had paid all arrears up to 1881; that the statute did not begin to run until then, if ever, the tenancy was not turned into a tenancy at will until the expiration of a year from the beginning of 1881.

It was also held there was sufficient acknowledgment in letters filed to take the case out of the statute and more than an oral acknowledgment such as in *Doe d. Perry v. Henderson* (1846) 3 U. C. R. 386 . . . reference to *Ryan v. Ryan* (*ante*, p. 905); Gwynne, J. [5 S. C. R.] at p. 414, and *Workman v. Robb* (1882) 7 A. R. 389, at p. 409, and the judgment was reversed.

*Bentley v. Peppard* (1903) 33 S. C. R. 444; 23 Occ. N. 212, was a case of a son let into possession as tenant at will acquiring title by virtue of the Statute [N.S. Appeal].

### *Case of Mortgagor or Cestui que trust.*

“No mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee within the meaning of the next preceding sub-section.”

[R. S. O. 1914, c. 75, s. 6 (8); 10 Edw. VII. c. 34 s. 6 (8); R. S. O. 1897, c. 133, s. 5 (8)].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 145, s. 21 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (2).

New Brunswick: C. S. N. B. 1903, c. 139, s. 8 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (f) (part).

### *When Claimant's Right Arises from Forfeiture.*

“Where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, such

right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.”

R. S. O. 1914, c. 75, s. 6 (9); 10 Edw. VII. c. 34, s. 6 (9); R. S. O. 1897, c. 133, s. 5 (9); R. S. O. 1887, c. 111, s. 5 (9).

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 4.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 18.

Manitoba: R. S. M. 1913, c. 116, s. 5 (g).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (e).

Saskatchewan: See p. 892, *ante*.

*When the Right Arises from Forfeiture which has not been Pressed.*

“Where the right of any person to make an entry or bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession, as if no such forfeiture of breach of condition had happened.”

[R. S. O. 1914, c. 75, s. 6 (10); 10 Edw. VII. c. 34, s. 6 (10); R. S. O. 1897, c. 133, s. 5 (10); R. S. O. 1887, c. 111, s. 5 (10)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 4.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 18.

Manitoba: R. S. M. 1913, c. 116, s. 5 (h).

New Brunswick: C. S. N. B. 1903, c. 139, s. 5.

Saskatchewan: See p. 892, *ante*.

*Future Estates.*

“Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest, such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.”

[R. S. O. 1914, c. 75, s. 6 (11); 10 Edw. VII. c. 34, s. 6 (11); R. S. O. 1897, c. 133, s. 5 (11); R. S. O. 1887, c. 111, s. 5 (11)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 3.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 17 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (*i*).

New Brunswick: C. S. N. B. 1903, c. 139, s. 4 (part).

Nova Scotia: R. S. N. S. 1900, c. 167, s. 10 (*d*).

Saskatchewan: See p. 892, *ante*.

*Future Estates—Further Provision.*

“A right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession by the determination of any estate or estates in respect of which such land has been held, or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent.”

[R. S. O. 1914, c. 75, s. 6 (12); 10 Edw. VII. c. 34, s. 6 (12); R. S. O. 1897, c. 133, s. 5 (12); R. S. O. 1887, c. 111, s. 5 (12)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 5, repealed by 37-38 Vict. c. 57, s. 2, substituting new provision.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 19 (part).

Manitoba: R. S. M. 1913, c. 116, s. 5 (j).

New Brunswick: C. S. N. B. 1903, c. 139, s. 6.

Saskatchewan: See p. 892, *ante*.

*When any Person has not Received Profits or Rent of Land before His Estate Therein Ceased.*

“If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession, or receipt of the profits, of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.”

[R. S. O. 1914, c. 75, s. 7 (1); 10 Edw. VII. c. 34, s. 7 (1); R. S. O. 1897, c. 133, s. 6 (1); R. S. O. 1887, c. 111, s. 6 (1)].

*Similar Legislation.*

England: 37-38 Vict. c. 57, s. 2 [12 years and 6 years].

Alberta: See p. 892, *ante*.

Manitoba: R. S. M. 1913, c. 116, s. 6.

Saskatchewan: See p. 892, *ante*.

*Bar of Future Estate and Subsequent Interest Created after Right of Entry.*

“If the right of any such person to make such entry or distress, or to bring any such action, has been barred,

no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined, shall make any such entry or distress, or bring any such action, to recover such land or rent."

[R. S. O. 1914, c. 75, s. 7 (2); 10 Edw. VII. c. 34, s. 7 (2); R. S. O. 1897, c. 133, s. 6 (2); R. S. O. 1887, c. 111, s. 6 (2)].

*Similar Legislation.*

England: 37-38 Vict. c. 57, s. 2.

Alberta: See p. 892, *ante*.

Manitoba: R. S. M. 1913, c. 116, s. 7.

Saskatchewan: See p. 892, *ante*.

*Bar of Right to Future Estate Acquired after Bar of Particular Estate.*

"Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period, which is applicable in such case, and such person has, at any time during such period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or by any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession."

[R. S. O. 1914, c. 75, s. 7 (3); 10 Edw. VII. c. 34, s. 7 (3); R. S. O. 1897, c. 133, s. 6 (3); R. S. O. 1887, c. 111, s. 6 (3)].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 20.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 32.

Manitoba: R. S. M. 1913, c. 116, s. 8.

New Brunswick: C. S. N. B. 1903, c. 139, s. 20.

Saskatchewan: See p. 892, *ante*.

*Administrator.*

“For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose property he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.”

[R. S. O. 1914, c. 75, s. 8; 10 Edw. VII. c. 34, s. 8; R. S. O. 1897, c. 133, s. 7; R. S. O. 1887, c. 111, s. 7].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 6.

Alberta: See p. 892, *ante*.

British Columbia, R. S. B. C. 1911, c. 145, s. 20.

Manitoba: R. S. M. 1913, c. 116, s. 9.

New Brunswick: C. S. N. B. 1903, c. 139, s. 7.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 11.

Saskatchewan: See p. 892, *ante*.

*A Mere Entry not to be Deemed Possession.*

“No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon.”

[R. S. O. 1914, c. 75, s. 9; 10 Edw. VII. c. 34, s. 9; R. S. O. 1897, c. 133, s. 8; R. S. O. 1887, c. 111, s. 8].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 10.

Alberta: See p. 892, *ante*.



British Columbia: R. S. B. C. 1911, c. 145, s. 24.  
 Manitoba: R. S. M. 1913, c. 116, s. 10.  
 New Brunswick: C. S. N. B. 1903, c. 139, s. 11.  
 Nova Scotia: R. S. N. S. 1900, c. 167, s. 12.  
 Saskatchewan: See p. 892, *ante*.

*Continual Claim.*

“No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.”

[R. S. O. 1914, c. 75, s. 10; 10 Edw. VII. c. 34, s. 10; R. S. O. 1897, c. 133, s. 9; R. S. O. 1887, c. 111, s. 9].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 11.  
 Alberta: See p. 892, *ante*.  
 British Columbia: R. S. B. C. 1911, c. 145, s. 25.  
 Manitoba: R. S. M. 1913, c. 116, s. 11.  
 New Brunswick: C. S. N. B. 1900, c. 139, s. 12.  
 Nova Scotia: R. S. N. S. 1903, c. 167, s. 13.  
 Saskatchewan: See p. 892, *ante*.

*No Descent, Cast, Warranty, etc., to Bar a Right of Entry or Action.*

“No descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land.”

[R. S. O. 1914, c. 75, s. 11; 10 Edw. VII. c. 34, s. 11; R. S. O. 1897, c. 133, s. 10; R. S. O. 1887, c. 111, s. 10].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 39.  
 Alberta: See p. 892, *ante*.  
 Manitoba: R. S. M. 1913, c. 116, s. 12.  
 Saskatchewan: See p. 892, *ante*.

*Coparcener, etc.*

“Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, has or have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.”

[R. S. O. 1914, c. 75, s. 12; 10 Edw. VII. c. 34, s. 12; R. S. O. 1897, c. 133, s. 11; R. S. O. 1887, c. 111, s. 11.]

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 12.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 26.

Manitoba: R. S. M. 1913, c. 116, s. 13.

New Brunswick: C. S. N. B. 1903, c. 139, s. 13.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 14.

Saskatchewan: See p. 892, *ante*.

*Relatives.*

“Where a relation of the persons entitled as heirs to the possession, or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs.

[R. S. O. 1914, c. 75, s. 13; 10 Edw. VII. c. 34, s. 13. R. S. O. 1897, c. 133, s. 12; R. S. O. 1887, c. 111, s. 12].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 13.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 27.

Manitoba: R. S. M. 1913, c. 116, s. 14.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 15.

Saskatchewan: See p. 892, *ante*.

“Where any acknowledgment in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.”

[R. S. O. 1914, c. 75, s. 14; 10 Edw. VII. c. 34, s. 14; R. S. O. c. 133, s. 13; R. S. O. 1887, c. 111, s. 13].

#### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 14.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 28.

Manitoba: R. S. M. 1913, c. 116, s. 15.

New Brunswick: C. S. N. B. 1903, c. 139, s. 14

Nova Scotia: R. S. N. S. 1900, c. 167, s. 16.

“The receipt of the rent payable by any lessee shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.”

[R. S. O. 1914, c. 75, s. 15; 10 Edw. VII. c. 34, s. 15; R. S. O. 1897, c. 133, s. 14; R. S. O. 1887, c. 111, s. 14].

#### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 35.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 42.

Manitoba: R. S. M. 1913, c. 116, s. 16.

New Brunswick: C. S. N. B. 1903, c. 139, s. 27.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 17.

“At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent for the recovery whereof such entry, distress or action respectively might have been made or brought within such period, shall be extinguished.”

[R. S. O. 1914, c. 75, s. 16; 10 Edw. VII. c. 34, s. 16; R. S. O. 1897, c. 133, s. 15; R. S. O. 1887, c. 111, s. 15].

#### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 34.

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 41.

Manitoba: R. S. M. 1913, c. 116, s. 17.

New Brunswick: C. S. N. B. 1903, c. 139, s. 26.

Nova Scotia: R. S. N. S. 1900, c. 167, s. 21.

Saskatchewan: See p. 892, *ante*.

#### *Disabilities and Exceptions.*

“If at any time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues as herein mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiocy, lunacy, or unsoundness of mind, such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.”

[R. S. O. 1914, c. 75, s. 40; 10 Edw. VII. c. 34, s. 40; R. S. O. 1897, c. 133, s. 43; R. S. O. 1887, c. 111, s. 43].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 16; repealed by 37-38 Vict. c. 57, s. 3 [twelve years and six years].

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 29; 5 Geo. V. c. 37, s. 3.

Manitoba: R. S. M. 1913, c. 116, s. 35.

New Brunswick: C. S. N. B. 1903, c. 139, s. 16 [twenty years and ten years].

Nova Scotia: R. S. N. S. 1900, c. 167, s. 18 [twenty years and ten years].

Saskatchewan: See p. 892, *ante*.

“No entry, distress, or action, shall be made or brought by any person, who at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued, was under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.”

[R. S. O. 1914, c. 75, s. 41; 10 Edw. VII. c. 34, s. 41; R. S. O. 1897, c. 133, s. 44; R. S. O. 1887, c. 111, s. 44].

*Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 17; repealed 37-38 Vict. c. 57, s. 5 [thirty years and six years].

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 30.

Manitoba: R. S. M. 1913, c. 116, s. 36.

New Brunswick: C. S. N. B. 1903, c. 139, s. 17 [forty years and ten years].

Nova Scotia: R. S. N. S. 1900, c. 167, s. 19 [forty years and ten years].

Saskatchewan: See p. 892, *ante*.

“Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.”

[R. S. O. 1914, c. 75, s. 42; 10 Edw. VII. c. 34, s. 42; R. S. O. 1897, c. 133, s. 45; R. S. O. 1887, c. 111, s. 45].

### *Similar Legislation.*

England: 3-4 Wm. IV. c. 27, s. 18; [twelve and six years, substituted for twenty and ten by 37-38 Vict. 57, s. 9].

Alberta: See p. 892, *ante*.

British Columbia: R. S. B. C. 1911, c. 145, s. 31.

Manitoba: R. S. M. 1913, c. 116, s. 37.

New Brunswick: C. S. N. B. 1903, c. 139, s. 18.

Saskatchewan: See p. 892, *ante*.

### *III. Eviction of Overholding Tenants by Action.*

#### *In Manitoba.*

The Manitoba Landlords and Tenants Act, R. S. M. 1913, c. 109, s. 5, enacts that: “If the term or interest of any tenant of lands, tenements or hereditaments, holding the same under a lease or agreement in writing *for any term or number of years certain, or from year to year*, expire or be determined, either by the landlord or tenant, by regular notice to quit; and a lawful demand of possession in writing, made and signed by the landlord or his agent, be served personally upon the tenant, or any person holding or claiming under him, or be left at the dwelling house or usual place of abode of such

tenant or person; and such tenant or person refuse to deliver up possession accordingly, and the landlord thereupon proceed by action for the recovery of possession, he may, at the foot of or by endorsement on the statement of claim, address a notice to such tenant, or person requiring him, to find such security if ordered by a Judge, and for such purposes as are hereinafter next specified."

Taken from R. S. M. 1902, c. 93, s. 5, and R. S. M. 1892, c. 48, c. 70 (part). The section corresponds with the provision formerly appearing in the Ontario Landlord and Tenant Act, R. S. O. 1897, c. 170, s. 26 [R. S. O. 1887, c. 143, s. 23]. The Ontario provisions were repealed in 1911: See 1 Geo. V. c. 37, s. 80.

Section 6 provides a form of notice.

By R. S. M. c. 109, s. 7: "If a statement of defence be filed, then upon the landlord applying to a Judge and producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit; and filing an affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be), and that possession has been lawfully demanded in manner aforesaid, the Judge upon such notice as shall be fixed by him, on a consideration of the situation of the premises, may order that such tenant or person within a time to be fixed enter into a bond to the plaintiff by himself and two sufficient sureties, in a reasonable sum conditioned to pay the costs and damages which may be recovered by the plaintiff in the action."

Origin: R. S. M. 1902, c. 93, s. 7 (part); R. S. M. 1892, c. 48, s. 71 (part); R. S. O. 1897, c. 170, s. 27; R. S. O. 1887, c. 143, s. 24.

R. S. M. 1913, c. 109, s. 8: "If such tenant or person neglect or refuse to comply with such order, and give no ground to induce the Judge to enlarge the time for obeying the same, then the lessor or landlord, upon filing an affidavit that such order has been made and served and not complied with, may sign judgment for the recovery of possession and costs of suit."

Origin: R. S. M. 1902, c. 93, s. 8; R. S. M. 1892, c. 48, s. 72 (part); R. S. O. 1897, c. 170, s. 28; R. S. O. 1887, c. 143, s. 25.

Section 9 provides a form of judgment.

R. S. M. 1913, c. 109, s. 10: "No action or other proceeding shall be commenced upon any bond after six months from the time when the possession of the premises, or any part thereof, has been actually delivered to the landlord."

Origin: R. S. M. 1902, c. 93, s. 10; R. S. M. 1892, c. 48, s. 74 (part); R. S. O. 1897, c. 170, s. 29; R. S. O. 1887, c. 143, s. 26.

*Eviction for Non-payment of Rent.*

*In Manitoba.*

*(By Action).*

The Manitoba Landlords and Tenants Act, R. S. M. 1913, c. 109, s. 23, provides that "In all cases between landlord or lessor and tenant, as often as it happens that one half year's rent is in arrear, and the landlord or lessor to whom the same is due has the right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a statement of claim for the recovery of the demised premises; or in case the same cannot be legally served or no tenant is in actual possession of the premises, then said landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such statement of claim is not for the recovery of any messuage, then upon some notorious place on the lands, tenements or hereditaments, comprised in the statement of claim; and such affixing shall be deemed legal service thereof, which service or affixing of the statement of claim shall stand in stead of a demand and re-entry."

The original of this section is the Imperial Statute, 4 Geo. II. c. 28, s. 2, which was re-enacted in England by the Common Law Procedure Act (1852) 15 & 16 Vict. c. 76, s. 210. See R. S. M. 1892, c. 48, s. 64 (part); R. S. M. 1902, c. 93, s. 23.



*Similar Legislation.*

Ontario: Had a similar section R. S. O. 1897, c. 170, s. 20.—[See R. S. O. 1887, c. 143, s. 17]—which was repealed. And see the provisions in the County Courts Act, R. S. B. C. 1911, c. 53, ss. 52 to 58.

24. In case the defendant do not defend the action, if it be shown by affidavit to the court wherein the action is depending, or in case he defend if it be proved upon the trial that half a year's rent was due before the statement of claim was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the landlord or lessor had power to re-enter, the landlord or lessor shall recover judgment and have execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.

25. If the lessee or his assigns, or other person claiming or deriving title under the said lease, suffer such judgment to be had and execution to be issued thereon, without paying the rent and arrears together with full costs, and without proceeding for equitable relief within six months after execution issued, then he shall be barred and foreclosed from all relief or remedy, other than by proceedings by way of appeal from such judgment; and the landlord or lessor shall from thenceforth hold the demised premises discharged from such lease.

26. Nothing hereinbefore contained shall bar the right of any mortgagee of such lease or any part thereof who is not in possession, if such mortgagee, within six months after such judgment obtained and execution executed, pay all rent in arrear and all costs and damages sustained by such lessor or person entitled to the remainder or reversion, and perform all covenants and agreements which on the part and behalf of the first lessee are to be or ought to be performed.

27. If the said lessee, assignee, or other person, proceed for equitable relief within the time aforesaid, he shall not be entitled to a stay of the proceedings, unless, within forty days next after an application for a stay,

he brings into court and lodges with the proper officer such sum of money as the lessor or landlord swears to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain until the hearing of the application for equitable relief, or to be paid out to the lessor or landlord on good security, subject to the judgment or order of the court; and if such proceedings for equitable relief be taken within the time aforesaid and after execution has been executed, the lessor or landlord shall be accountable only for so much as he really and *bona fide*, without fraud, deceit or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof; and if what he has so made is less than the rent reserved on the said lease, then the said lessee or his assignee, before being restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the lands.

28. If the tenant or his assignee, at any time before the trial of the action, pay or tender to the lessor or landlord, or to his solicitor in the cause, or pay into the court wherein the cause is depending, all the rent and arrears together with the costs, all further proceedings in the action shall cease; and if such lessee or his assigns, upon such proceedings as aforesaid, obtain equitable relief, he and they shall have, hold and enjoy the demised lands according to the lease thereof made, without any new lease.

#### *Summary Proceedings.*

On a vendor's and purchaser's application an order may [under Rule 602, new in 1913] be made binding upon a tenant and a declaration was made that a monthly tenant was holding wrongfully as against the landlord and an order that he should immediately give up possession: *Re Abromovitch and Gulofsky* (1920) 18 O. W. N. 140 [Orde, J.].

By the Ontario Landlord and Tenants Act, R. S. O. 1914, c. 155, Part III., s. 75 (1). "Where a tenant, after his lease or right of occupation whether created by writ-

ing or by parol, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses [A.] [or neglects] to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord, [B.] may apply upon affidavit to the Judge of the County [or District] Court of the county, or district, in which the land lies, to make the inquiry hereinafter provided for."

Recently 1 Geo. V. c. 37, s. 75 (1), taken from the Overholding Tenants Act, R. S. O. 1897, c. 171, s. 3 (1): See R. S. O. 1887, c. 144, s. 2; 59 Vict. c. 42, s. (4) (1); 60 Vict. c. 14, s. 28 (2). The Act of 1897 had not the words in brackets and had at [A.] "upon demand made in writing" and at [B.] "or the agent of his landlord."

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 19 (1) (part). And see c. 53, ss. 50 and 51 [County Court Act].

Manitoba: R. S. M. 1913, c. 109, s. 11 (part).

New Brunswick: Compare C. S. N. B. 1903, c. 153, s. 30, and 9 Edw. VII. c. 32, adding ss. 36 to 46.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 3 (3).

Saskatchewan: (1919) 9 Geo. V., c. 79, s. 42 (1), copied from s. 75 (1) (*supra*).

With the exception of the Saskatchewan Act these sections correspond to R. S. O. 1897, c. 171, s. 3 (1).

Under the statute the Judge acts as *persona designata*: *In re Dewar and Dumas* (1904) 8 O. L. R. 141 [Anglin, J.]: *Carley v. Bertrand* (1894) 5 W. L. T. 158 [Dubuc, J.].

Holding over is wrongful notwithstanding a tenant does not refuse to give possession: *Dominion Coal Co. v. McLeod* (1909) 7 E. L. R. 20; 29 C. L. T. 1089.

Proceedings under the County Courts Act s. 50, can only be taken when the relation of landlord and tenant

exists and where the occupation was as "servant" only the proceedings were dismissed: *McNeely v. Carey* (1914) 7 W. W. R. 689 [B. C.—Howay, Co.J.].

The New Brunswick Act creates a new jurisdiction, and only applies to a clear case of landlord and tenant; and such a tenancy does not exist between mortgagor and mortgagee, where, beyond the relationship, there is no evidence of tenancy: *Ex parte McBean* (1885) 24 N. B. R. 362.

D., who was in possession of hotel premises under an agreement to purchase, assigned to the sheriff for the benefit of his creditors. D. was allowed to remain in possession. Subsequently the sheriff, as assignee, obtained title from the owner and sold at public auction all his interest as assignee to the plaintiff. It was held that no relationship of landlord and tenant existed between the plaintiff and D., and that the plaintiff could not recover possession by summary ejectment: *Sweeney v. De Grace* (1913) 42-N. B. R. 344 [Ct. en B.].

A purchaser in possession under an agreement for sale under the terms of which he was to be a tenant at will, was held not to be a tenant at will or tenant for a fixed term so as to be subject to the provisions of the Summary Ejectment Act, C. S. N. B. c. 83, or Amending Act: *Winslow v. Nugent* (1903) 36 N. B. R. 356.

It had previously been held that the Act did not apply to a tenancy at will: *Ex p. Irvine* (1852) 7 N. B. R. 519.

"Landlord" is defined in s. 2 (b) of the Ontario Act as meaning and including lessor, owner, the person giving or permitting the occupation of the premises in question and his and their heirs and legal assigns and representatives and, in Parts II. and III., also including "the person entitled to the possession of the premises."

By s. 2 (d) "Tenant" shall mean and include lessee, occupant, sub-tenant, under-tenant and his or their assigns and legal representatives."

The British Columbia Statute, s. 18; the Nova Scotia Act, s. 2, are similar.

In *Re Mitchell and Fraser* (1917) 40 O. L. R. 389; 38 D. L. R. 597; 13 O. W. N. 60 [App. Div.], it was held that

“the person entitled to the possession of the premises” in proceedings under this enactment must be some one of the character of a “landlord” and the “occupant” must be some one of the character of a tenant. Therefore, one of several mortgagees has no right to obtain possession under this Act from his mortgagor when there was no attornment clause in the mortgage.

It should be observed that a mortgagee, from whom the mortgagor had accepted a lease, was not allowed, on the expiration of the term, to proceed against the mortgagor as an overholding tenant under the former Act: *Con. Stat. U. C. c. 27, s. 63; Re Reeve* (1869) 4 P. R. 27.

*“Upon Demand Made in Writing.”*

*In re Fee and Adams* (1910) 1 O. W. N. 812 [Div. Ct.] a tenant had the order for the writ set aside on the ground of the absence of a demand of possession after his tenancy was determined, which was necessary to give jurisdiction: *Re Grant and Robertson* [see p. 938, *post*] followed.

These words still appear in all Acts other than the Ontario Act.

The former Act applied only to tenants whose terms had expired by lapse of time, and not to cases of forfeiture: *Re McNab* (1845) 3 U. C. R. 135, but under the existing law, a different rule prevails.

There was a lease of a “refreshment room and apartments connected therewith,” part of a railway station, and the lessee covenanted that “no spirits of any kind should be sold, or allowed to be sold, in the refreshment room,” and that if he “should fail, refuse or neglect to carry out the terms of the lease, then that he should, if required by the lessor, quit, leave and absolutely vacate the premises, and the lease should terminate.” The Judge of the County Court, on an application under the Act, found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and that the landlord was entitled to possession. On

removal of the proceedings by *certiorari*, this decision was confirmed, and it was held that the proviso for termination of the lease extended to negative covenants: *Longhi v. Sanson* (1881) 46 U. C. R. 446.

S. and his partners were tenants of D. under a lease, which provided that any assignment by the lessees for the general benefit of creditors should forfeit the term. The lessees, at a time when two quarters' rent were overdue and in arrears, made such an assignment to C., who thereupon took possession of the premises, and shortly afterwards paid D. the two quarters' arrears of rent. A few weeks later D. served on S. and his partners a demand of possession, and notice of application to the Judge under the Act, which S. handed to C., and the latter appeared before the County Judge on the hearing of the application, and had himself added as a party to the proceedings. It was held that the Act applied to cases of forfeiture for this cause, and the making of the assignment determined the tenancy, and the former lessees were thereafter tenants at sufferance, and that C., having intervened in the proceedings, could not object that no demand had been served upon him. The demand served claimed possession from the tenant and all claiming under them: *Dobson v. Sootheran* (1888) 15 O. R. 15; see also *Nash v. Sharp* (1870) 5 C. L. J. 73.

In *In re Ryan and Turner* (1904) 14 M. R. 624; 24 Occ. N. 255 [Perdue, J.] a writ was ordered where the term was forfeited for breach of a covenant not to permit the premises to be used for dancing—and see *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466, where it was held that the institution of summary proceedings was an election by the landlord to forfeit a lease for non-payment of rent [see p. 725, *ante*]. It was held that the scope of the inquiry is limited by s. 75 to the matters there enumerated. If the tenant desired equitable relief he must seek it in an independent action or in the lessor's action to enforce his right of re-entry.

It has been held that where it is sought to forfeit a lease for breach of covenant and the breach is one of which notice is required to be given under the provisions

of the Act, noted at p. 733, *ante*, before re-entry can be made the summary procedure may not be availed of until the notice is given: *Re Snure and Davis* (1902) 4 O. L. R. 82 [Div. Ct.].

When, on the expiration of a tenancy, crops remain to be valued and paid for to the tenant, this should be done, and the amount tendered before applying under the Act: *Re Boyle* (1865) 2 P. R. 134.

Where the tenant paid two months' rent, it was held that he could not, in the middle of the third month, be treated as an overholding tenant under the 4 Wm. IV., c. 1: *Adams v. Bains* (1847) 4 U. C. R. 157.

R. S. B. C. 1911, c. 126, s. 19 (part), amended by (1913) 3 Geo. V. c. 38, s. 2, gives the requirement as to the affidavit and material.

Sec. 19 (2) extends the application to all tenancies.

Under s. 12 an application against an overholding tenant may be made to any Judge, but the Judge so applied to is a *persona designata*, and has alone jurisdiction to hear it: *Carley v. Bertrand* (1894) 5 W. L. T. 158.

By R. S. M. 1913, c. 109, s. 12, the application may be made to a Judge of the Court of King's Bench if the premises are within or partly within the judicial division of Winnipeg, otherwise to a County Court Judge of the judicial division in which the demised premises are wholly or partly situate.

By s. 13 the County Court Judge may refer the matter to a Judge of the King's Bench.

By s. 14 the appropriate King's Bench Rules are made applicable to the proceedings.

The requirements of the affidavit set out in section 11 should be carefully considered.

The demand was unsigned, but its purport was explained to the tenants, who were told that it was from the landlord's agent and one of them went to see him about it. It was held a sufficient demand under the circumstances: *In re Sutherland and Portigal* (1899) 12 M. R. 543; 19 Occ. N. 257 [Richards, J.].

There is no "expiration of the tenancy" within the meaning of the statute when the landlord relies upon

a surrender of the lease by the tenant: *Philip v. McLaughlin* (1885) 24 N. B. R. 532.

The demand of possession was held to be bad for uncertainty in *In re Myers and Murrans* (1904) 24 Occ. N. 186 [Wallace, Co.J.—N. S.]. Owing to erasures there was some doubt as to whether the lease expired on the 1st March or the 1st May. Notice to quit on the 1st May was given February 1st, and then the demand of possession given on March 9th, on the ground of the expiration of the lease March 1st.

This section indicates that the landlord is required to make out a case before he obtains an appointment: *Re Rousseau v. Leclair* (1920) 18 O. W. N. 340 [App. Div.].

The following discussion is based upon ss. 75 (2) to 78 of the Ontario Act.

“75. (2) [Ont.] The Judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or has been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession.”

[Taken from 1 Geo. V. c. 37, s. 75 (2): see R. S. O. 1897, c. 171, s. 3 (2), and R. S. O. 1887, c. 144, s. 2; 60 V. c. 14, s. 28 (2); 59 V. c. 42, s. 4 (1)].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 20; R. S. B. C. 1897, c. 172, s. 4, amended by striking out “without colour of right” (1899) 62 Vict. c. 73, s. 2.

Manitoba: R. S. M. 1913, c. 109, s. 15, is copied from R. S. M. 1902, c. 93, s. 15, which commenced: “If upon such application it appears to such Judge that the tenant wrongfully holds [without colour of right] and that the landlord is entitled to possession.” The words in brackets were struck out in 1904 by 4 Edw. VII. c. 29, s. 1. R. S. M. 1913, c. 109, s. 15, “reads”: “If . . . it



appears . . . that the material . . . affords *prima facie* evidence of the landlord's right to possession he shall without delay, etc."

Nova Scotia: R. S. N. S. 1900, c. 174, s. 3 (2).

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 42 (2).

"75. (3) [Ont.] Notice in writing of the time and place appointed stating briefly the principal facts alleged by the complainant as entitling him to possession, shall be served upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place appointed is not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the Judge's appointment and of the affidavit on which it was obtained, and of the documents to be used upon the application."

[Taken from 1 Geo. V. c. 37, s. 75 (3): See R. S. O. 1897, c. 171, s. 4; R. S. O. 1887, c. 144, s. 4; 59 Vict. c. 42, s. 4 (3); 60 Vict. c. 14, s. 28 (3)].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 21; R. S. B. C. 1897, c. 182, s. 5; (1899) 62 Vict. c. 73, s. 3, substituted 5 for 3.

Manitoba: R. S. M. 1913, cap. 109, s. 16, corresponds to the section in the R. S. O. 1897 and provides that the copy of affidavit shall be annexed to or served with the notice, also a copy of all the papers annexed to or filed with the application: see p. 931, *ante*.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 4.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 42 (3).

Where the tenant appears, failure to serve the affidavit would be an irregularity that might be waived — as in this case by examining and cross-examining witnesses and arguing the case; but where the tenant does not appear there must be a strict compliance with the requirements of this section: per Anglin, J., in *In re Dewar and Dumas* (1904) 8 O. L. R. 141; 24 Occ. N. 360;

4 O. W. R. 110, following *Smith v. Smith* (*infra*), in preference to *Carley v. Bertrand* (*infra*).

Under the Nova Scotia Act the summons to the tenant must be served with a copy of the affidavit. Where the copy of the affidavit was served before the summons, it was held that the tenant's appearance waived the irregularity; but two Judges held that the services need not be concurrent: *Smith v. Smith* (1884) 17 N. S. R. 42 [Full Court].

Under the Manitoba Act the notice in writing of the place appointed for holding the inquiry must have attached to it, when served on the tenant, copies of the affidavits filed when applying for the appointment, and of all papers attached thereto: *Carley v. Bertrand* (1894) 5 W. L. T. 158 [Dubuc, J.].

An objection taken at the hearing that the copies served with the notice were not "annexed" to the notice was held to have been waived by not being taken as a preliminary objection, but the Act had probably been complied with any way: *In re Sutherland and Portigal* (1899) 12 M. R. 543; 19 Occ. N. 257 [Richards, J.].

"76. [Ont.] The proceedings under this Part shall be intituled in the County Court or District Court of the county or district in which the land lies, and shall be styled:

"In the matter of (*giving the name of the party complaining*), Landlord, against (*giving the name of the party complained against*) Tenant."

[Taken from 1 Geo. V. c. 37, s. 76; R. S. O. 1897, c. 171, s. 10; R. S. O. 1887, c. 144, s. 10.]

#### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 27.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 8.

Manitoba: R. S. M. 1913, c. 109, s. 21.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 43.

"77. (1) [Ont.] If at the time and place appointed the tenant fails to appear, the Judge, if it appears to him

that the tenant wrongfully holds [against the right of the landlord] may order a writ of possession, Form 3, directed to the sheriff of the county or district in which the land lies to be issued, commanding him forthwith to place the landlord in possession of the land.”

[Taken from 1 Geo. V. c. 37, s. 77 (1); R. S. O. 1897, c. 171, s. 5 (part), which had not the words in brackets].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 22 (part); R. S. B. C. 1897, c. 182, s. 6 (part); words “without colour of right”; struck out in (1899) 62 V. c. 73, s. 4.

Manitoba: R. S. M. 1913, c. 109, s. 17 (part) corresponded to R. S. O. 1897, c. 144, s. 5 (part), and had instead of the words in brackets the words “without colour of right.” These words were struck out in 1904, 4 Edw. VII. c. 29, s. 1.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 5 (part).

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 44 (1).

“77. (2) [Ont.] If the tenant appears the Judge shall, in a summary manner, hear the parties and their witnesses and examine into the matter, and if it appears to the Judge that the [A] tenant [wrongfully holds against the right of the landlord] he may order the issue of the writ.”

[Taken from 1 Geo. V. c. 37, s. 77 (2); R. S. O. 1897, c. 171, s. 5 (part), which had at [A] the words “case is clearly one coming under the true intent and meaning of s. 3 of this Act and that the—” These words were dropped in 1911: see 1 Geo. V. c. 37, s. 77 (2). R. S. O. 1887, c. 144, s. 5; 58 Vict. c. 13, s. 23 (3), which substituted the words in brackets for the words “without colour of right”; 59 Vict. c. 18, sched. 47].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 22 (part); R. S. B. C. 1897, c. 182, s. 6 (part); (1899) 62 Vict. c. 73, s. 4, struck out “without colour of right.”

Retains words formerly at [A].

Manitoba: R. S. M. 1913, c. 109, s. 17 (part); taken from R. S. M. 1902, c. 93, s. 17 (part), which until 1904 had for the words in brackets "holds without colour of right" struck out by 4 Edw. VII. c. 29, s. 1, and has for "may," "shall." The Manitoba section still has the words which formerly appeared at [A] in the Ontario section.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 5 (part); (1889), c. 9, s. 62, has the words formerly at [A] but not the words "without colour of right." See also 9 Edw. VII. c. 10, s. 1. Form A was amended in (1910) 10 Edw. VII. c. 17, s. 16.

Saskatchewan: (1919) 9 Geo. V. c. 79, s. 44 (2).

In *Re St. David's Mountain Spring Water Co. and Lahey* (1912) 4 O. W. N. 32; 23 O. W. R. 12; 7 D. L. R. 84 [Div. Ct.], Britton, J., said, at p. 35: "It is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and . . . the Judge may do this on conflicting evidence."

These words were quoted with approval by Riddell, J., in *Re Dickson Co. of Peterborough* (1912) 27 O. L. R. 239; 4 O. W. N. 100; 8 D. L. R. 928 [App. Div.], at p. 242; and he continues: "It is now the duty of the County Court Judge to determine whether the tenant 'wrongfully holds against the right of the landlord': sec. 77 (2); and no colour of right set up by the tenant justifies him in declining to exercise his statutory duty."

Mulock, C.J.Ex., also outlines the duty of the County Court Judge in *Re Bagshaw and O'Connor* (1918) 42 O. L. R. 466 [App. Div.], and points out that possession is the only relief that may be granted by an order made under this section.

The word "may" is the governing word with regard to cases within this legislation. See per Meredith, C.J. C.P., in *Re Mitchell and Fraser* (1917) 40 O. L. R. 389, at p. 391; 38 D. L. R. 597; 13 O. W. N. 60.

In *Re Graham and Yardley* (1909), 14 O. W. R. 30; 29 C. L. T. 869, it was held that the County Court Judge was competent to try and determine a question of fact,

viz., the expiry of a lease, where there is conflicting evidence.

This case was followed in *In re Fee and Adams* (1910), 1 O. W. N. 812 [Div. Ct.].

In May, 1910, the tenant commenced an action against his landlord for breach of covenant, and an injunction was given ordering that the tenant should not be further proceeded against "otherwise than by proper and legal procedure in a court of law," until the action should be tried. In July, 1910, the landlord commenced proceedings under the Overholding Tenant Act, having served a notice claiming possession and a demand of possession. Riddell, J., held that the proceedings were "legal procedure in a court of law," and the service of a demand for possession was not an interference with the tenant's possession, citing *Ball v. Carlin* (1908) 11 O. W. R. 814, 816, 817. He also held it to be no objection that the matter in dispute was involved in the High Court action begun before the overholding tenant proceedings were begun, saying, p. 127: "There is nothing to prevent any landlord from applying for any remedy given him by statute or common law." He held also that he could not remove the proceedings as no writ had issued—and dismissed a motion for prohibition without prejudice to an application under section 6, at the proper time: *Re Broom v. Godwin* (1910) 2 O. W. N. 125; 17 O. W. R. 102 [Riddell, J.].

The company, claiming to be the owners of certain property in the possession of Lahey, whom they alleged to be their tenant, served him with a notice to deliver up possession. Upon his refusal to do so, they took proceedings under the Overholding Tenants Act, before the Judge of the County Court of the county of Welland. The Judge made an order for possession; and Lahey appealed therefrom, upon the grounds that the Judge's decision was wrong in law and in fact and that evidence was wrongly excluded. A Divisional Court remitted to the County Court Judge for new trial the question of tenancy on the ground of improper rejection of evidence. Costs

of appeal to be in discretion of Judge on new trial: *Re St. David's Mountain Springs Water Co. v. Lahey* (*supra*).

*Where the Case "Clearly" Comes Within the Act.*

"Under the Overholding Tenants' Act two things must concur to justify the summary interference of the Judge: (1) The tenant must *wrongfully* refuse to go out of possession; and (2) it must appear to the Judge that the case is *clearly* one coming under the purview of the Act. These two adverbs seem to be used emphatically . . . ." Per Boyd, C., in *Re Snure and Davis* (1902), 4 O. L. R. 82; 22 Occ. N. 234; 1 O. W. R. 379.

The latter requisite is now done away with in Ontario by the amendment noted above.

The effect of leaving the words "clearly," etc., in the Act while striking out the words "without colour of right," was considered in *In re Lumbers and Howard* (1905), 9 O. L. R. 680; 5 O. W. R. 772; 25 C. L. T. 346 [Div. Ct., MacMahon, J.], where the Court followed *Moore v Gillies* [*post*, p. 939] and *Ryan v. Turner* [*ante*, p. 930], and see *Re Magann and Bonner* (1897) 28 O. R. 37 [Div. Ct.].

*Re Grant and Robertson* (1904), 8 O. L. R. 297; 3 O. W. R. 846; 24 Occ. N. 366 [Div. Ct.], dealing with the Act as it then stood held that the question of right might be summarily tried. And see *In re Fee and Adams*, noted at p. 929, *ante*.

The Court held that a case was one clearly coming "under the true intent and meaning of" the Act, although the landlord claimed the right to re-enter for rent due and the tenant claimed a set-off which left no rent due: *Re Hooker and Malcolm* (1903), 2 O. W. R. 49 [Div. Ct.].

*"Without Colour of Right."*

Prior to the amendment [in 1895] striking out the words "without colour of right," it was held that the Act conferred no authority on the County Judge to try the question of the tenant's right or title: *Price v. Guin-*

ane (1888), 16 O. R. 264; *Magann v. Bonner* (1897), 28 O. R. 37; *In re London and Ontario Investment Co. and McKittrick* (1898) 18 Occ. N. 75 [Man.—Bain, J.].

In *Moore v. Gillies* (1897), 28 O. R. 358; 17 Occ. N. 118 [Div. Ct.], the Court said: "All questions of 'colour of right' have been repealed by the amending statute, and the Judge . . . now tries the right and finds whether the tenant wrongfully holds."

These words do not appear in any of the Acts as at present framed.

In *Re Broom and Godwin* [noted at p. 937, *ante*], Riddell, J., also held that the County Court Judge had power to decide whether the tenant wrongfully held, following *Moore v. Gillies*, and referring to *Magann v. Bonner* and an article in 33 C. L. J. 185, on the law in Ontario, before the amending Acts.

A dispute between the parties as to the date of the commencement of the tenancy is a matter of "colour of right," and a County Court Judge should dismiss the case: *Price v. Guinane* (*supra*), followed; *Bartlett v. Thompson* (1889), 16 O. R. 716 [Div. Ct.].

Where the question of the tenant's right or title is *bona fide* raised, the County Court Judge or justices should not continue the trial: *Ex parte Tower* (1889), 28 N. B. R. 159.

In *Girroir v. Ronan* (1909) 7 E. L. R. 153 [N.S.], it was held that the County Court Judge had jurisdiction to determine whether the respondent was in possession as mortgagor or tenant at will.

In *Stone v. Brooks* (1903), 2 O. W. R. 306 [Britton, J.], an action for illegal seizure was brought by a writ tested the 24th February, 1902. The landlord took proceedings under the Overholding Tenants' Act on 1st April, 1902, when another gale of rent had become due. It was held that the plaintiff in the action was not estopped by the finding on the summary proceedings that there was rent due. It was not the duty of the County Court Judge to determine how the account for rent stood in February nor could he determine as between the parties how the rent stood in the action.

In the case of a monthly tenancy, the landlord, on the 31st of March, mailed a notice to quit directed to the tenant in these words: "You will please vacate by 30th of April, 1894." The tenant did not receive the notice till the 1st of April. It was held that the words "by 30th of April" meant not later than, or as early as, the 30th April; and that the notice, even if given in sufficient time, was bad as requiring the tenant to leave before the expiration of his term; and, as the notice was not valid, the tenant was not estopped by acquiescence in it from setting up that he still had the right to remain, and it could not be said that he was holding over without colour of right: *Magee v. Smith* (1894) 10 M. R. 1; 5 W. L. T. 97; 14 Occ. N. 288; *Cartwright v. McPherson* (1861) 20 U. C. R. 251, dissented from.

Whether there is colour of right or not and what constitutes colour of right are matters of law to be determined by the Judge. To constitute a colour of right there must be some *bona fide* question of right to be tried: *Price v. Guinane* (*ante*, p. 938), followed. In *Re C. P. R. and Lechtzier* (1903), 14 M. R. 566; 23 Occ. N. 339; 39 C. L. J. 798 [Perdue, J.].

*In re Ryan v. Turner* (1904), p. 929, *ante*, was the first case tried in Manitoba after the amendment which struck out the words "without colour of right," and a writ was ordered to issue where the tenancy had determined by breach of a covenant.

In *Re Rousseau and Leclair* (1920), 18 O. W. N. 340 [App. Div.], Ferguson, J.A., said: "Section 75 . . . indicates that the landlord is required to make out a case before he obtains an appointment; and, by serving copies of the affidavits along with the appointment, to give notice to the tenant of the reasons why he demands or is entitled to possession. Here no attempt was made to prove the notices set up in the affidavits.

"The tenant's husband denies that the landlord or Turpin gave him (Leclair) any notice other than that of the 18th February; the statements as to what was said at a meeting on the 9th or 10th February differed each from the other; and the District Court Judge had not found which was the true account.



“The onus was on the landlord, and he had not satisfied that onus in reference to the alleged oral notice. All the facts and circumstances, particularly the written notice of the 18th February, led to the conclusion that the landlord did not rely upon any prior oral notice. There were also the objections that at the time the notice was alleged to have been given by Turpin, he had not completed his purchase from Rousseau; that the notice was not given to the tenant, but to her husband; and that the landlord should not be allowed to set up in appeal a notice not relied upon on the application for an appointment or at the hearing.

“The landlord had failed to prove a termination of the tenancy; and so the order appealed from should be vacated, with costs of the proceedings below and of the appeal to the tenant.”

“78 (1) [Ont.] An appeal shall lie to a Divisional Court from the order of the Judge granting or refusing a writ of possession, and the provision of the County Courts Act as to appeals shall apply to such an appeal.”

[This section was new in 1911: See 1 Geo. V. c. 37, s. 78 (1). The R. S. O. 1897, c. 171, s. 6, provided that: “Where such writ has been issued, the High Court or a Judge thereof may on motion, within three months after the issue of the writ, command the Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and the Court may examine into the proceedings, and, if the Court finds cause, may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land.”

*Legislation Similar to Section 6.*

British Columbia: R. S. B. C. 1911, c. 126, s. 23 [Supreme Court]; R. S. B. C. 1897, c. 182, s. 7.

Manitoba: R. S. M. 1913, c. 109, s. 18, gives an appeal to the Court of Appeal.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 6 [Supreme Court]; 1889, c. 9, s. 62 (part).

*Legislation Similar to Section 78 (1).*

Saskatchewan: (1919), 9 Geo. V. c. 79, s. 45. Appeal to a Judge of the King's Bench in Chambers. Section 46 deals with evidence on appeal as to facts.

Where a landlord applied to a County Court Judge to make the inquiry provided for in section 75, and he dismissed the application, it was held that his refusal to decide was in effect a refusal of a writ of possession, and that an appeal would lie: *Re Dickson Co. of Peterborough and Graham* (1912), 27 O. L. R. 239 [Div. Ct.].

It was held that an application under section 6 of the R. S. O. 1897, c. 171, R. S. O. 1887, c. 144, to the High Court to review the proceedings might be properly made to the Divisional Court; and it would seem to be the only Court in which the motion can be made: *Re Scottish Ontario & Manitoba Land Co.* (1891), 21 O. R. 676.

It was held that proceedings under this section could only be removed after the writ had issued: *In re Warbick and Rutherford* (1903), 6 O. L. R. 430; 23 Occ. N. 326; 2 O. W. R. 609, 961 [Div. Ct.], and see *In re Dewar and Dumas* (1904), 8 O. L. R. 141 [Anglin, J.], and *Re Broom and Godwin* (1910), 2 O. W. N. 125 [Riddell, J.], noted at p. 937, *ante*.

A single Judge of the Supreme Court has no appellate jurisdiction conferred on him by section 23, and a motion to a single Judge for an order commanding a County Court Judge to send up the proceedings and evidence in connection with his judgment for a writ of possession was refused: *In re Landlord and Tenant Act; In re Selman et al.* [1920], 2 W. W. R. 539 [B.C.—Macdonald, J.].

In *Dominion Coal Co. v. McInnes* (1910) 7 E. L. R. 508; 30 C. L. T. 561, an application for an order directing a County Court Judge to send up for review proceedings under the Overholding Tenant Act [N.S.], was refused,

as none of the reasons in support were substantial or sufficient.

In *Harris v. Harris* (1920) 16 O. W. N. 216; 47 O. L. R. 321, Falconbridge, C.J.K.B., said:—

“After the commencement of this action, the defendant took proceedings under the overholding tenants provisions of the Landlord and Tenant Act, and ejected the plaintiff from the premises, under the supposed authority of the two documents referred to. The order made by the District Court Judge under that Act was not appealed from; and the plaintiff could not recover damages for the ejectment: Holmsted’s Judicature Act, 4th ed., p. 1141, and cases cited.”

“78 (2) [Ont.] If the Divisional Court is of opinion that the right to possession should not be determined in a proceeding under this part, the Court may discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession.”

[New in 1911: See 1 Geo. V. c. 37, s. 78 (2)].

### *Similar Legislation.*

Saskatchewan: (1919), 9 Geo. V. c. 79, s. 47 (1) has “Judge” instead of “Divisional Court.”

“It is not for the County Court Judge to decide whether the right of the tenant should be determined under [this] Act; that function is vested in the Divisional Court [s. 78 (2)], and not in the County Court Judge.” Per Riddell, J., in *Re Dickson Co. of Peterborough and Graham* (1912), 27 O. L. R. 239, at p. 242; In *Re Bagshaw and O’Connor* (1918), 42 O. L. R. 466, at p. 475 [App. Div.], Mulock, C.J.Ex., considered the jurisdiction given under this section.

“78(3) [Ont.] When the order is discharged, if possession has been given to the landlord under a writ of possession, the Court may direct that possession be restored to the tenant.”

[This provision was new in 1911: See 1 Geo. V. c. 37, s. 78 (3)].

*Similar Legislation.*

Saskatchewan: (1919), 9 Geo. V. c. 79, s. 47 (2).

*Miscellaneous Provisions.*

Until 1911 the Ontario Act, R. S. O. 1897, c. 171, contained the following sections, now replaced by s. 79:—

“7. The Judges of the High Court may from time to time make such Rules respecting costs, in cases under this Act, as to them seem proper; and the County Court Judge before whom any such case is brought may, in his discretion, award costs therein, according to any such Rule then in force, and if no such Rule is in force, reasonable costs, in his discretion, to the party entitled thereto; and in case the party complaining is ordered to pay costs, execution may issue therefor, out of the County Court as in other cases in the County Court, where an order is made for the payment of costs.”

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 24.

Manitoba: R. S. M. 1913, c. 109, s. 19.

“8. The Judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the County Court, and under like penalties for non-attendance, or refusing to answer in such case.”

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 25.

Manitoba: R. S. M. 1913, c. 109, s. 20.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 7.

“9. Nothing herein contained shall in any way affect the powers of any Judge or Judges of the High Court under sections 26, 27 and 28 of the Act respecting the Law of Landlord and Tenant, or shall prejudice or affect

any other right or right of action or remedy which landlords may possess in any of the cases herein provided for."

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 26.

"11. Service of all papers and proceedings under this Act shall be deemed to have been properly effected if made as required by law, in respect of writs and other proceedings in actions for the recovery of land."

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 28.

Manitoba: R. S. M. 1913, c. 109, s. 22.

Nova Scotia: R. S. N. S. 1900, c. 174, s. 9, as substituted by (1910), 10 Edw. VII. c. 17, s. 15.

The costs of a summary proceeding under R. S. M. 1902, c. 93 [now 1913, c. 109] are of and taxable upon the same scale as an action in the King's Bench: *Re West Winnipeg Development Co. and Smith* (1910) 20 M. R. 274; 15 W. L. R. 343 [Mathers, C.J.K.B.—Man.].

The matter came up again before the same judge in *Suckling v. Lyons Paint and Glass Co.* [1920], 3 W. W. R. 5; 51 D. L. R. 700, and he said (p. 701):—

"The question of the scale of costs applicable to proceedings of this kind first came before the late Chief Justice Sir Thomas W. Taylor in *Winnipeg v. Guiler* (1885), 3 M. R. 23. In all essential respects the present Act is substantially the same as the Act then in force. After consulting two of the other Judges he decided that the costs were to be taxed according to the 'scale of costs in like proceedings' and that the nearest analogy of a 'like proceeding' was a trial of an action for ejectment. He pointed out that the then Act said nothing about the application being made in Chambers but that it was to be made to a Judge of the Court whether in term or in vacation, and that it was a mere accident

that he heard the application while sitting in Chambers. The same observation may be made with respect to the present Act.

“In *West Winnipeg Development Co. v. Smith* (1910) 20 M. R. 274, I followed *Winnipeg v. Guiler*. The Act has been several times revised and consolidated since *Winnipeg v. Guiler* and once since *West Winnipeg Development Co. v. Smith*, without any change having been made to indicate that these decisions did not express the intention of the Legislature.”

### *Alberta.*

By Rule 429 [Alberta]: “Where under any Statute of Alberta or Ordinance of the North-West Territories proceedings may be taken by originating summons, such proceedings may be taken by notice as hereinafter set out.”

By Rule 432 (a) [Alberta]: “Proceedings to recover possession of land may be commenced by originating notice.”

The Master in Chambers has no power to make an order upon originating notice, for the delivery of possession of land by an overholding tenant: *Macdonald v. Georgiades* (1916) 34 W. L. R. 964 [Alta.—Walsh, J.], but in this case an appeal from such an order was turned into a substantive motion for possession.

Rule 469 J.O. [now 429], only authorized proceedings by way of originating summons to recover possession of demised premises from an overholding tenant, and the Court can not in such an application order payment by the tenant of an amount for use and occupation since the date the rent was paid: *Wallace v. Day* (1912), 22 W. L. R. 92; 2 W. W. R. 846 [Alta.—Walsh, J.].

Application for leave to amend the affidavit on which the originating summons was issued was refused: *Smith v. Macfarlane* (No. 1), (1903) 5 Terr. L. R. 491 [Scott, J.].

A local Judge may in certain cases issue the originating summons under J.O., s. 469, but it must be returnable before a Supreme Court Judge: *Porter v. Rooney* (1908), 8 W. L. R. 289 [Alta.—Stuart, J.].

The J.O. s. 469, may only be invoked in the most simple cases where it is unnecessary to prove devolution of title, and where it appeared from the affidavit filed that the relationship was not created between the plaintiff and defendant, but between the plaintiffs' predecessor in title and the defendant, the summons was dismissed with costs. *Id.*

But it has been held that a District Court Judge as Local Judge of the Supreme Court has power to make the order in proceedings in the Supreme Court: *Sadowski v. Jacobus* [1920] 1 W. W. R. 504 [Alta.—Walsh, J.].

#### *Yukon.*

A landlord proceeding under J.O., s. 477, is limited to the recovery of possession of the demised premises and cannot in such a proceeding recover *mesne* profits: *Re Fuller and Cuthbert* (1907), 6 W. L. R. 717; 27 C. L. T. 812 [Y.T.—Dugas, J.].

#### *Saskatchewan.*

“Proceedings by a landlord to recover possession of demised premises from an overholding tenant may be commenced by originating summons.” [Rule 600, C. O. 21: R. 469, added to by 1903, Sess. 1, c. 8, s. 4].

If there is a disputed issue of fact the matter cannot be disposed of by originating summons, Rule 593 not covering cases under Rule 600: *Sun Electrical Co. v. McClung* (1913) 25 W. L. R. 43 [Sask.—Parker, M.].

An oral agreement extending time, made by an officer of a landlord-company who has no authority to make it, is not binding upon the company, the agreement not being one coming within the purposes for which the company was incorporated [*ibid.*].

See also *Isman v. Widen* [1920] 3 W. W. R. 766; 55 D. L. R. 184 [Sask.—C.A.].

#### *Eviction in Manitoba by Summary Proceedings for Non-payment of Rent.*

“If a tenant fail to pay his rent within three days of the time agreed on, and wrongfully refuse or neglect,

upon demand made in writing, to pay the rent or to deliver up the premises demised, which demand shall be served upon the tenant or upon some grown-up person upon the premises, or if the premises be vacant, be affixed to the dwelling or other building upon the premises or upon some portion of the fences thereon, the landlord or his agent may apply to the clerk of the County Court of the judicial division in which said premises are situate, or partly situate, upon affidavit setting forth the terms of the demise or occupancy, the amount of rent in arrear and the time for which it is so in arrear, producing the demand made for the payment of rent or delivery of the possession, and stating the refusal of the tenant to pay the rent or to deliver up possession, and the answer of said tenant, if any answer were made, and that the tenant has no right of set-off or reason for withholding possession; and upon such filing the clerk shall cause to be issued from the said Court a summons calling upon such tenant, three days after service, to show cause why an order should not be made for delivering up possession of the premises to the landlord, which summons shall be served in the same manner as the demand. Upon the return of said summons, the Judge of said Court, or in his absence from the place of return of said summons, a justice of the peace shall hear the evidence adduced upon oath, and make such order, either to confirm the tenant in possession or to deliver up possession to the landlord, as the facts of the case shall warrant; and in case the order be made for the tenant to deliver up possession and he refuse, then a bailiff of the said County Court shall, with such assistance as he may require, forthwith proceed, under said order, to eject and remove the said tenant, together with all goods and chattels that he may have on or about the premises, and make the rent in arrear:—

Provided that, if any tenant, before the execution of the order, pay the rent in arrears and all costs, the said proceedings shall be stayed and the said tenant may continue in possession as of his former tenancy;

Provided, also, that, in case the premises in question be vacant, or the tenant be not found in possession, or if



in possession and he refuse, on demand made in the presence of a witness, to admit the bailiff, the latter, after a reasonable time has been allowed to the tenant or person in possession to comply with the demand for admittance, may force open any outer door in order to gain an entrance, and may also force any inner door, for the purpose of ejecting the tenant or occupant and giving proper possession of the premises to the landlord or his agent."

R. S. M. 1913, c. 109, s. 29 [Landlord and Tenant Act].

"The said Judge or Justice may award such costs as he may see fit, and as the circumstances of the case may warrant, to the landlord or the tenant, as the case may be, which costs, if payable by the tenant, may be added to the costs of the levy for rent, if any such shall or can be made, or in any case may be recovered by action against the landlord or tenant in the proper Court."

R. S. M. 1913, c. 109, s. 30.

"The summons and order under section 29 of this Act, may be in the forms in Schedule D to this Act respectively."

R. S. M. 1913, c. 109, s. 31.

See also R. S. B. C. 1911, c. 55, ss. 52 to 58 [County Court Act].

*Provisions Applicable when the Tenant Deserts the Premises.*

By the Imperial Statute, 11 Geo. II., c. 19, s. 16: "If any tenant holding any lands, tenements or hereditaments at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff or receiver, to go upon and view the same, and to

affix or cause to be affixed on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforward become void."

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 6.

This Act is in force in Ontario, and a landlord may proceed under it though the lease contains no proviso for re-entry: *Huskinson v. Lawrence* (1866), 25 U. C. R. 496. Fourteen days at least mean fourteen clear days: *Creak v. Brighton* (1858), 1 F. & F. 110.

Under section 17, the proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises lie.

*Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 7.

## CHAPTER XV.

### RENEWALS—VALUATION OF BUILDINGS—OPTIONS TO PURCHASE THE FREEHOLD.

#### ARTICLE 135.—*The Contract to Renew.*

Interpretation.

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Loss of the right.

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ments.

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corporations.

Options to lessee to purchase the fee.

### RENEWALS.

ARTICLE 135.—A lessor may in his lease grant to the lessee an option to renew the lease or to take a new lease or the lease may contain a covenant appertaining to the parties or to one of them for the renewal of the lease for a further term or for further terms, as provided in the lease, or to renew or pay for improvements, but in the absence of a clear,

distinct and unambiguous provision for perpetual renewals, a covenant to renew a lease with the same covenants as contained in the original lease is satisfied by omitting the covenant for renewal.

A contract for renewal made by the agent of a corporation tenant not under seal and under which possession is not taken will not support an action for rent or use and occupation: *Wilkes v. The Home Life Association of Canada* (1904) 8 O. L. R. 91 [Div. Ct.].

### *Covenants to Renew.*

The question frequently arises as to whether a certain clause contains a covenant for renewal.

The lease considered in *Alexander v. Herman* (1912) 21 O. W. R. 461; 2 D. L. R. 239; 3 O. W. N. 755, contained the following provision: "The lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year so long as he may care to do so." It was held that this agreement derived no strength from the Short Forms Act. It was not a covenant and did not bind the land. It was not expected to bind and did not bind the heirs, etc., of the lessee. It was merely a contract by which the lessor gave to the lessee the privilege of renewing from year to year so long as the lessee might desire. The lessee's desire must be signified to the lessor (*Brewer v. Conger* (1900) 27 A. R. 10). Once that is done the uncertain element is removed and the agreement is made certain.

In *Rogers v. National Drug and Chemical Company* (1911) 23 O. L. R. 234; 2 O. W. N. 763; 18 O. W. R. 686, affirmed by the Court of Appeal, 3 O. W. N. 33; 20 O. W. R. 16, a lease contained the following clause: "And the lessor further agrees with the said lessee that he will at the end of the term of five years give the said lessee the option of a further term of five years, and the lessor further agrees that in case of sale he will give the said lessee the further option to purchase." Riddell, J., held that this clause gave the lessee a renewal for a

further five years at his option; that an offer to sell to the tenant made before a sale to a stranger pursuant to this clause and refused by the tenant had no effect on the question of renewal, and that the tenant was entitled to a new lease in the said terms, but without the renewal clause, following *Lewis v. Stephenson* (1898) 67 L. J. (Q. B.) 296; 78 L. T. 165, and cases cited.

Where the lessor's covenant was to grant a renewal lease at any time before the expiration of the term whenever required by the lessees, and upon payment of a specified sum as a fine on its execution, it was held not necessary for the lessee to pay the fine or execute a new lease before the expiration of the term, but that notice of an intention to renew should be given before the expiration of the term, and that for this purpose an informal notice was sufficient: *Nicholson v. Smith* (1882) 22 Ch. D. 640; 52 L. J. (Ch.) 191; 47 L. T. 650; 31 W. R. 471.

Plaintiff leased to one M. certain premises for 21 years, and it was stipulated by the lease that at the expiration of the term the lessee might retain possession on condition that within three months a new rent should be ascertained by arbitration, but that if the lessor should desire to resume possession he might do so on paying the value of the improvements, to be ascertained as therein provided for, and this arrangement was to be made at the end of each term. It was then provided that if "at the expiration of the next or any subsequent term of twenty-one years no new ground rent should be ascertained as aforesaid," or if the lessor should not resume possession, then the lessee should continue "upon payment of the rent last ascertained to be payable." This lease was assigned by M. to defendant as trustee for F. At the expiration of the first term of twenty-one years no notice was given nor new rent fixed, but after the three months had gone by arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at a sum more than five times the first rent, or that the lessor should pay a certain sum for the improvements. The lessor elected to renew and notified

the lessee, who refused to accept at the new rent. It was held that the plaintiff could not recover in ejectment, for whether the arbitration was binding on defendant or not as to the amount of rent, he was entitled to a new term by the conditions of the lease, and there had been no forfeiture. The award, however, was held not binding, because the submission was by the *cestui que trust*. It was also held that the provision recited that if "at the expiration of the next or any subsequent term of 21 years" no new ground rent was fixed, the tenant should hold at the former rent applied at the end of the first term of 21 years as well as at subsequent terms, and therefore the tenant was entitled to continue at the original rent. The lease being dated before its execution the word "next" meant next after the execution: *McDonell v. Boulton* (1859) 17 U. C. R. 14.

M. leased certain premises to E. for twenty-one years, covenanting that if E., his executors, administrators or assigns, should desire to renew said terms (three months' notice having been first given), the rent for the extended period should be fixed by arbitration; that if M. neglected to seal and deliver a new lease upon the terms agreed upon, M., his heirs and assigns, would pay or cause to be paid, at a fair valuation, to E. for all buildings or improvements put upon the premises, excepting those erected at the date of the lease; that if M. neglected or refused to pay within one month for such improvements, the lease should be deemed and considered to be renewed for twenty-one years longer, at the same rent as before. M. devised the premises in question to the plaintiffs or some of them. E. sublet to H. B. W., and subsequently assigned to defendant, having previously and about three months before its expiration made a claim in writing for a renewal of the term. Defendant notified the plaintiffs before the expiry of the term of his purchase of the lease and his readiness to submit to arbitration as to the improvements made during the term. N., one of the plaintiffs, replied on their behalf that the devisees would not renew and requested defendant to point out the improvements made by E. and defendant with a view to

arbitration if necessary. No improvements of any kind had been made by E. prior to the sub-lease, nor by defendant since the assignment, but all had been done by H. B. W. during his sub-tenancy, he having erected several buildings in addition to those already on the premises. No demand of possession was made other than that contained in the reply to defendant's notice. On ejectment brought by the plaintiffs it was held that the refusal by the latter to renew the lease was a refusal to settle a new rent and to execute a new lease and a discharge to the defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of the plaintiffs to pay for them; that the improvements to be paid for were not those to be made by E. alone, but by any person claiming under him having the right to make them, and that H. B. W. had that right, and the improvements made by him, not having been paid for by plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favour of defendant, the assignee of it: *Nudell v. Williams* (1866) 15 U. C. C. P. 348.

In *Robinson v. Estabrooks & McAlary* (1909) 9 N. B. Eq. 168; 7 E. L. R. 131, by consent a renewal clause was amended by correcting an obvious error.

#### *Conditions Precedent to a Renewal.*

Under a covenant in a lease that the lessors would at the expiration of the term thereby granted, grant another lease "provided the said lessee . . . should desire to take a further lease of said premises" no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances: *Brewer v. Conger* (1900) 27 A. R. 10; 20 Occ. N. 59, followed; *Hoadley v. Bayntun* (1915) 31 W. L. R. 751 [B.C.].

In *Greenwood v. Bancroft* (1912) 2 W. W. R. 162; 20 W. L. R. 816; 2 D. L. R. 417, it was held that where a lease gives the tenant an option to renew on giving notice

in writing of his intention to exercise the option, a notice which is not signed by the tenant does not effect a renewal.

In *Brewer v. Conger* (*supra*), it was held no notice was necessary.

See *Le Corporation, etc., de St. Albert v. Sheppard* (1913) 3 W. W. R. 814 [Alta.—Scott, J.], where the two months' notice required was not given, but a tenancy for another year was implied from the acceptance of rent. The fact that a tenant for a year with an option of renewal has been turned out of possession is not a reason for not exercising the option, even if the year has expired before the conclusion of an action for damages for the loss of possession: *Gardiner v. Ware* (1913) 4 W. W. R. 1356; 25 W. L. R. 153 [Sask.—Newlands, J.].

### *Enforcement of the Right of Renewal.*

In *Farley v. Sanson* (1902) 5 O. L. R. 105; 23 Occ. N. 13; 1 O. W. R. 738 [Boyd, C.], affirmed (1904) 7 O. L. R. 639; 3 O. W. R. 460; 24 Occ. N. 303 [C.A.] it appeared the lease terminated on the 1st of November (1900). On April 30th preceding, the lessees notified the lessor that they would give possession and had no desire to renew. The lessor did nothing to relieve the lessee of possession. In February (1912) the lessors took proceedings to fix the renewal rent by arbitration. In an action by the lessees for a declaration that they were not bound to renew Boyd, C., held that there had not been such delay as to preclude the lessor from enforcing a renewal of the lease and at page 107, he said: "The lease is a peculiar one and is singularly silent about certain things that one might expect: 'It is hereby declared and agreed that at the expiration by effluxion of time of the term hereby granted it shall be at the election of the lessors either to take the improvements made by the lessee on the said premises'—one would think that it was at the expiration by effluxion of time that the lessors were to make their election, but when you come to read further on you will see the right of election is thrown forward to a later



date, namely, until an award is made; so the collocation of the words is not very happy—at a valuation or to grant to the lessees a new lease of the said demised premises for a further term . . . such valuation of improvements, or such renewal rent, shall prior to the making of such election as aforesaid be ascertained or fixed by the award of three arbitrators . . . such choosing of arbitrators to be not sooner than one month preceding the determination of the term.”

The courts will not decree specific performance to compel a renewal when the lessor may renew or pay for improvements: *City of Toronto v. Ward* (1908) 18 O. L. R. 214; 11 O. W. R. 653 [C. A.—Div. Ct.—Britton, J.], following *Hutchinson v. Boulton* (*post*).

Where a lease contains a covenant on the part of the lessor for a renewal of the term, or in default payment of improvements, notwithstanding the rule that the words of the covenant are taken most strongly against the covenantor, the option rests with him either to renew or pay for the improvements, and the lessee cannot compel a specific performance of the contract to renew when the lessor elects to pay for the improvements: *Hutchinson v. Boulton* (1853) 3 Gr. 391.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired

the lessees continued in possession and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender, and after demand of further rent and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option, but it was held that they were not entitled to succeed: *Sears v. Mayor St. John* (1898) 18 S. C. R. 702; 28 N. B. R. 1.

### *The Parties to Whom the Right Appertains.*

A right of renewal appertaining to a lessor only cannot be extended to a lessee no matter how one-sided the agreement may be. But if the writing be ambiguous the extraordinary agreement contended for may be taken into consideration and easily turn the scales against the contention. In this case it was held on a consideration of the peculiarly worded lease that there was a right of renewal exercisable by the lessee as well as the lessor: *MacDonnell v. Davies* (1913) 4 O. W. N. 620; 23 O. W. R. 778; 9 D. L. R. 24.

### *The Rights of Assignees.*

Riddell, J., held that the right of the tenant to the renewal could be exercised by his assignee through *mesne* assignment, and that it was not a mere personal option which was not assignable: *C. P. R. v. Rosin* (1911) 2 O. W. N. 610, referred to; *Rogers v. National Drug and Chemical Co.* (1911) 23 O. L. R. 234; 18 O. W. R. 686; 2 O. W. N. 763, affirmed; 3 O. W. N. 33; 20 O. W. R. 16, and see *Alexander v. Herman* [p. 952, *ante*].

The covenant for renewal is indivisible, and if the lessee assign a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion. This applies even although the assignment includes an assignment of the right to renewal for the part assigned and the lessor has assented thereto. It was held that he did not thereby agree that his coven-

ant for renewal would be exercised in respect to a part only of the demised premises: *Alexander Brown Milling and Elevator Co. v. Canadian Pacific Railway Co.* (1910) 42 S. C. R. 600; 30 C. L. T. 335, 1038; 31 C. L. T. 193, affirming (1909) 18 O. L. R. 85 [C. A.]; 29 C. L. T. 328; 13 O. W. R. 301. Anglin, J., said, at p. 610: “ ‘Under the covenant to renew the tenant can only ask for such a lease as the landlord covenanted to grant’: *Finch v. Underwood* (*infra*), per Mellish, L.J. at p. 316. It is difficult to understand how he can by any act of his vest any other right in his assignees. The lessors’ burden might be much increased by the granting of such separate leases; their rights and remedies would be materially diminished.”

### *What the Right Entails.*

Where a lessor covenants with joint lessees to grant a renewal lease in case the tenant’s covenants have been duly performed, he is not bound to renew where there is a breach of a covenant to repair, and one of the lessees has become bankrupt: *Finch v. Underwood* (1876) 2 Ch. D. 310; 45 L. J. Ch. 522 [C. A.]; see also *Bastin v. Bidwell* (1881) 18 Ch. D. 238.

These cases were applied in *Loveless v. Fitzgerald* (1909) 42 S. C. R. 254 [see p. 971], a case of forfeiture for breach of the covenant not to assign or sublet without leave. The lease provided that in case the lessees had kept and performed all their covenants and agreements and should give notice in writing to the lessees six months before the term expired that they required it, the lessors would grant a renewal for five years. The notice was given but subsequently there was a breach of the covenant not to assign without leave. It was held that this breach caused a forfeiture of the right of renewal. The Court, see per Anglin, J., at p. 262, declined to follow a *dictum* of Mellish, L.J., in *Finch v. Underwood* (*supra*), to the effect that a condition such as the above is satisfied if the covenants “have been so observed and performed that there is no existing right of action

under them at the time when the lease is applied for," as interpreted by Kay, J., in *Bastin v. Bidwell* (*supra*), where he said (p. 250): "That must mean, I suppose, at the time when the notice was given." In neither of these cases was it necessary to decide the point.

A lease by a church corporation contained a covenant that if at the expiration of the term the lessee should desire a new lease for 21 years, he should be entitled to a preference; and in case he should refuse to take such new lease on the terms required by the lessor, that the buildings then on the demised premises erected by the lessee should be appraised, and that the lessor, first paying to the lessee the amount of such appraisement, should be entitled to enter upon the premises and have the improvements; and in case the lessor should not consider it expedient to pay the amount of the appraisement, that then the lessee should be entitled to receive "a new lease of the premises for a further term of 21 years upon the same terms and conditions of the present lease." It was held on renewal of the lease that the lessee was entitled to the same covenants for payment for improvements and for delivering up possession on receiving such payments as were contained in the former lease: *Bedell v. Rector* (1855) 8 N. B. R. 217.

In a lease for five years dated the 1st of November, 1871, the lessee agreed in lieu of rent to clear certain specified portions. Appended to the lease was an agreement dated 25th January, 1876, which was to form part of the lease, "that in the event that the lessee shall get a release of the premises now leased after the expiration of the said lease, then the value of a certain barn built by the lessee on said premises shall be allowed to apply to the rent which shall be payable during the said release. The value of the said barn is \$400. In the event that there being no release as aforesaid, that the lessor shall pay to the lessee the sum of \$400 for the said barn at the expiration of the said lease." It was held that the term "release" must be construed to mean a renewal of the old lease, and therefore a lease for the same term, and

the rent would be payable as before by improvements, *i.e.*, the barn, and the lessor having refused to grant a new lease for more than three years, the lessee was held entitled to the \$400: *Dawson v. Graham* (1880) 41 U. C. R. 532.

The lessee is not entitled to have premises other than those demised in the original lease included in the renewal lease. In the case of *City of Toronto v. Ward* (1908), 18 O. L. R. 215; 13 O. W. R. 312; 12 O. W. R. 426; 11 O. W. R. 653 [C.A.—Div. Ct.—Britton, J.], considered at length at p. 814 (*ante*), the tenant unsuccessfully argued that he was entitled to have other land of the lessor upon which he had encroached during the original term included in the renewal lease.

“In order to entitle the tenant to the benefit of the covenant in respect to land not included in it, he must establish some equity which would justify the Court in extending the operation of the covenant. Such an equity existed in *White v. Wakeley* [(1858), 26 Beav. 17], by reason of the express sanction given by the landlord to the tenant, including the encroachment with the demised premises . . . Here the rights of the parties are purely legal.” Per Anglin, J. [at p. 227], in *City of Toronto v. Ward* (*supra*).

Where a lessor has, under the terms of his lease, an option to continue the lease or pay for improvements, the lessee, continuing in possession after the expiration of the lease, is not bound to prepare and tender to the lessor the necessary instrument for continuing the tenancy before the lessor has declared whether he will renew or pay for the improvements. The lessor should in such case expressly make his option and declare it to the lessee: *Ansley v. Peters* (1847) 5 N. B. R. 543.

A lease for years provided that when it expired the lessor had the option of renewing for the further term or paying for improvements. On its expiration the lessor notified the lessee that he would not renew, that he had appointed an appraiser to value the improvements, and requested her to do the same. This she did, but when

the valuation was made refused to accept, claiming that it was invalid. She refused to surrender on the ground of the invalid appraisement. It was held affirming (1908), 38 N. B. R. 465; 4 E. L. R. 550; 5 E. L. R. 350 [*Purdy v. Porter*] [Full Ct.], that the appraisement was invalid, but that the lessor had by his acts validly exercised his option not to renew, and was entitled to possession: *Porter v. Purdy* (1909), 41 S. C. R. 471; 6 E. L. R. 440; 29 C. L. T. 616.

A covenant in a lease provided that if the lessee desired to take a new lease and gave thirty days' notice the lessors would grant such lease, or, if they did not see fit to renew the lessee should receive a sum for the buildings and improvements. It was held that the lessors had the right to elect and that unless before the expiration of the term the lessors elected not to renew, the lessee must accept a renewal. The lessee gave the notice of his desire for a new lease, and Moss, J.A., said, at p. 231: "Upon the facts stated the plaintiff's notice perfected his right to a new lease . . . I do not see how any inaction on the part of the lessors is to be treated as an assertion on their part that they do not see fit to give a new lease. To my mind it is rather an indication that they accede to the terms of the notice. . . On the other hand the plaintiff . . . was not called upon to take further steps. . . :'' *Ward v. City of Toronto* (1898) 29 O. R. 729; 18 Occ. N. 360 [Meredith, C.J.C.P.], affirmed (1899) 26 A. R. 225; 19 Occ. N. 207 [C. A.] by Maclellan, J.A., on different grounds; by Moss and Osler, J.J.A., on the grounds given by Meredith, C.J.C.P., Burton, C.J.O., and Lister, J.A., concurred in the result.

In *Alexander Brown Milling and Elevator Co. v. Canadian Pacific Railway Co.* (1910) 42 S. C. R. 600 [see p. 958, *ante*], at p. 607, Anglin, J., adopts the reasoning of Moss, J.A., in *Ward v. City of Toronto*.

In *Ward v. Hall* (1899) 34 N. B. R. 600, it was held on the construction of the covenant that it was optional with the lessor to renew or pay for the improvements, and upon his showing that he was ready and willing to renew the lease he was discharged.

A covenant in a lease to pay for buildings and erections if on a renewal term the lessors should demand a rent the lessees were unwilling to pay, was held to cover fixtures and machinery which would have been parts of the freehold, but for this provision when the lessees declined to take them away: *Re Brantford Electric Co. and Draper* (1896) 28 O. R. 40; 16 Occ. N. 346 [Div. Ct.], affirmed 24 A. R. 301; 17 Occ. N. 209 [C. A.].

The defendants were tenants in possession under a parol lease for a term expiring on the 12th February, 1898, with a right to renew for two years. Before the expiration of the term they repeatedly notified their landlord that they did not intend to exercise their option and sent her the key three or four days after the 12th February. A sub-tenant of part of the premises who had been a sub-tenant of the landlord and remained on as a sub-tenant of the defendants, continued in the premises after they left. It was held that these circumstances did not mean that the defendants had exercised their option, but at the most they were liable for use and occupation: *Lindsay v. Robertson* (1899) 30 O. R. 229 [Div. Ct.].

In *Laba v. McGovern* (1919) 44 D. L. R. 551; 52 N. S. R. 440 [Full Court] the plaintiff let to the defendant certain premises by lease in writing dated 1st May, 1917: "To have and to hold the premises . . . from the first day of May for the term of 1 year then next ensuing . . . with the option of continuing the lease from year to year until one or the other give notice in writing to quit 3 calendar months previous to the termination of any year."

The plaintiff gave the defendant notice on January 3, 1918, to vacate on April 30, following.

The tenant held beyond the year without apparently giving any notice of his intention to remain (although there was no evidence of that fact). Proceedings were then taken before the County Court Judge to expel the tenant as overholding.

An appeal was taken to Ritchie, E.J., and from him to the Full Court. It was held that the defendant must

be taken as remaining under his option and was not an "overholding tenant." Mellish, J., considered *Waring v. King* (1841) 8 M. & W. 571, and *Ferguson v. Cornish* (1760) 2 Burr. 1032, and continued:

"There is a statement in the case of *Lewis v. Stephenson* (1898) 67 L.J.Q.B. 296, where a tenant held for a term of 3 years 'with the option of renewal,' and the lease was silent as to the time when the renewal should be made or applied for, that the option should be exercised within a reasonable time before the expiration of the term. The above statement made by Bruce, J., is said to be clearly unnecessary to the decision of that case. (Foa on Landlord and Tenant, 4th ed., p. 310, note d.). But that is not this case. Here, the option is expressly 'of continuing the lease,' which, as already pointed out, could only be exercised at the conclusion of the antecedent term. In my opinion, the tenant in the present case was under no obligation to apply for a renewal at all. The lease was to extend for a further period if the lessee so desired, and, in my opinion, there is no implied condition that he should give any notice of such desire, or, indeed, that such desire should exist before the expiration of the year. Such an implication would, I think, be in violation of the express terms of the lease which gives the option expressly to the tenant 'to continue the lease'; that is, stay on after the year has elapsed without any fetter or condition annexed to such right. See *Brewer v. Conger* (1900) 27 A. R. 10, and cases there cited. See, also, *Cartwright v. Herring* (1904) 3 O. W. R. 511 [Ferguson, J.]. The case of *Lindsay v. Robertson* (1899) 30 O. R. 229, was cited as authority for the proposition that the holding of the keys by a tenant for a few days beyond the original term, and the possession of a sub-tenant thereafter of a part of the demised premises, were not sufficient to constitute an exercise of the tenant's option to renew. This text-book statement is not borne out by a perusal of the case, which shows that, before the expiration of the term, the tenants expressly notified the landlord more than once that they did not intend to exercise their option and that the landlord was at liberty to re-rent the premises."



*Perpetual Renewals.*

As Falconbridge, C.J.K.B., points out in *Re Jackson and Imperial Bank of Canada* (1917) 39 O. L. R. 334; 36 D. L. R. 589; 12 O. W. N. 124, "the leaning of the Courts is against perpetual renewals," and the intention to renew perpetually must clearly appear from the language of the lease.

This general principle has been settled for many years, and is laid down in a great many English cases: *Baynham v. Guys Hospital* (1796) 3 Ves. 295; *Moore v. Foley* (1801) 6 Ves. 232; *Iggulden v. May* (1804) 9 Ves. 325; *Brown v. Tighe* (1834) 2 Cl. & F. 396, and *Sadlier v. Biggs* (1853) 4 H. L. C. 435, being the oldest and most commonly referred to.

The rule is sufficiently well settled but the matter constantly comes before the Courts where the application of the rule turns upon the construction of some particular renewal clause.

A provision for a perpetual renewal is not void; although the Courts lean against such a covenant they will recognize it if it is properly expressed: *Baynham v. Guys Hospital* (ante); *Clinch v. Pernette* (1894) 24 S. C. R. 385, affirming (1893) 26 N. S. R. 410, referred to; *Alexander v. Herman* (1912) 3 O. W. N. 755; 21 O. W. R. 461; 2 D. L. R. 239.

But although the rule has been long established there is a great volume of more modern English and Canadian authority on the subject. The Court again laid it down in *Swinburne v. Milburn* (1884) 9 A. C. 844, and it has been repeated in nearly all the Canadian Courts.

"Under a covenant for renewal the lessee is not entitled to a renewal in perpetuity but only to one renewal unless the language used in the covenant expressly or by clear implication shows that the parties intended a renewal in perpetuity," per Teetzel, J., in *Wilson v. Kerner* (1912) 3 O. W. N. 769, at p. 770; 3 D. L. R. 11; 21 O. W. R. 477.

“In order to establish such a construction such an intention must be clearly and unequivocally expressed and a proviso in general terms that the renewal lease shall contain the same covenants and agreements as the lease containing the covenant for renewal has been repeatedly held not to extend to the covenant for renewal”: *ib.*, citing *The King v. St. Catharines Hydraulic Company* (1910) 43 S. C. R. 595, reversing (1910) 30 C. L. T. 1038 [Ex. Ct.]. In this case the covenant provided that the lessee, his executors, etc., “shall be entitled to a renewal of this lease for a further period of five years from the expiration of the term above demised at the same rental and upon the same terms and conditions in all respects, if the said lessee shall desire to hold the same for such extended term,” and it was held that there was no intention to give a perpetual renewal.

*Cases in which Perpetual Renewals Have Been Upheld.*

The case most frequently referred to of the earlier cases on this point is *Hare v. Burgess* (1857) 27 L.J. (Ch.) 86; 4 K. & J. 45; Lord Hatherley, then Vice-Chancellor, expressed his opinion as to the principle upon which such covenants ought to be construed. He says: “As regards the first and main question, I must hold that the covenant in the original lease is in effect a covenant for perpetual renewal. Mr. Batten argued that this question must never depend upon mere inference; that, in the absence of words indisputably pointing to a perpetual renewal—words so strong that it is impossible to adopt any other construction—the Court, although it may find in the instrument words apparently pointing to a perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the term of the covenant. To that view I cannot accede. It seems to me that the true rule of construction in a case like this, is that referred to by Lord Justice Turner as Vice-Chancellor in *Rochford v. Hackman* (1852, 21 L. J. (Ch.) 511, at p. 513; 9 Hare 475, at p. 483), where he says that some effect must, if possible, be given to all the words of an

instrument; and if the Court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in the way, it will construe them in that manner. The Court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal—that *prima facie* a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention; and if there be, the Court will not force the construction, but will give effect to what appears to be the lessor's intention."

The next case to consider is *Swinburne v. Milburn* (1884) 54 L. J. (Q. B.) 6, at p. 9; 9 App. Cas. 844, at p. 850), in which Lord Selborne, L.C., says: "I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly impose upon any one claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

These judgments were quoted and followed by Joyce, J., in *Wynn v. Conway Corporation* (1914) 84 L.J. (Ch.) 203 [1914] 2 Ch. 705. In that case it appeared that the lease contained the following covenant: "They, the lessors, will at the expiration of the first 11 years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of 21 years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of 11 years aforesaid or upon the 29th day of September next after the determination of the said 11 years the sum of eleven pounds and ten shillings for a fine for the said premises, that then the lessors shall and will at the proper

costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of 21 years to commence from the expiration of the said eleven years at, with and under the like rents, covenants and agreements as are in these presents mentioned, expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of seven pounds and ten shillings on the day or time hereinbefore limited or appointed." For 90 years leases had been granted by the corporation to the plaintiff or his predecessors in title upon the same terms. In 1912 the corporation refused to renew. In the lessees' action for specific performance, Joyce, J., at p. 204 (84 L. J. Ch.), quoted the remarks of Lord Hatherley, V.C., in *Hare v. Burgess* (ante), and of Lord Selborne, L.C., in *Swinburne v. Milburn* (ante), and proceeded at p. 207: "I think I shall be following Vice-Chancellor Wood in *Hare v. Burgess*, and not acting at variance with the opinion expressed by Lord Selborne, L.C., in *Swinburne v. Milburn*, if I hold, as I do, that the effect of the covenant in the present case is to confer upon the lessee a perpetual right of renewal at the expiration of every successive period of eleven years (because that is what it comes to) upon payment of the fine of £7 10s." This judgment was affirmed by the Court of Appeal.

These last three cases were considered by Falconbridge, C.J.K.B., in *Re Jackson and Imperial Bank* (1917) 39 O. L. R. 334; 12 O. W. N. 124. In that case there was a covenant for renewal saying, *inter alia*, that the new lease should "contain all the covenants contained in this lease, including the covenant for renewal." It was held that the renewal lease should contain a covenant for renewal in the same words.

And there is no doubt that the Court will, in a proper case, order a perpetual renewal, as if the lessee have constructed expensive and permanent works on the faith of

an agreement to give such a term: *Davis v. Lewis* (1885) 8 O. R. 1.

A lessee brought an action to recover possession of land under a lease for three lives, which the lessor alleged had expired though renewable forever. The only evidence of the lease was the counterpart produced by the lessor's solicitor and agent, to whom it was handed 15 or 20 years before the trial, who continued to hold it and collect the rental reserved in it until the principal took possession, claiming that all the lives had fallen. On the lease was an endorsement purporting to be made by the devisee of the lessor, by which, for the consideration mentioned in the lease, the life of J. S., who was still living at the time of the trial, was substituted for that of E. C., which had fallen, the lease containing a clause entitling the lessee to have a new life inserted on payment of a certain sum. The Court held that the endorsement must be regarded as an admission of the substitution of a new life, according to the terms of the lease, and that the lessee was, therefore, entitled to possession and an account of the profits: *Pernette v. Clinch* (1890) 26 N. S. R. 410; 15 Occ. N. 265, affirmed; *Clinch v. Pernette* (1895) 24 S. C. R. 385.

In *Hoadley v. Bayntun* (1915) 31 W. L. R. 751, the lease contained the following option: "And at the option of the lessee the term hereby demised shall be renewed for a further term of one year and so on from year to year at a like rental, and upon similar terms": Swanson, Co.J., held that the covenant could not be construed as granting a right for perpetual renewal.

And it has already appeared [p. 952, *ante*] that in *Rogers v. National Drug and Chemical Co.*, it was held there was no right of perpetual renewal.

### *The Rule Against Perpetuities.*

A covenant for perpetual renewal is not within the rule against perpetuities, and its validity for that reason alone will not be denied: *London & South Western Ry.*

*Co. v. Gomm* (1882) 20 Ch. D. 562; *Muller v. Trafford* [1901] 1 Ch. 54; *Woodall v. Clifton* [1905] 2 Ch. 257.

The question as to whether an option to purchase the freehold infringes this rule is discussed at p. 996, *post*.

### *Evidence in Aid of Interpretation of Covenants.*

In *North Eastern Railway v. Hastings* (Lord) (1900) 69 L. J. (Ch.) 516; [1900] A. C. 260, it was laid down that where the words of the document were plain and unambiguous the fact that the parties had for many years interpreted it otherwise, would not affect its construction. This case was cited in the argument of *Wynn v. Conway Corporation*, referred to at p. 967, *ante*.

In *Wilson v. Kerner* (1912) 3 O. W. N. 769, it was held that the contents of prior leases or any other act of the parties cannot be invoked to aid in the interpretation of such a plain and unambiguous covenant as was considered in that case (see p. 965, *ante*), following *Baynham v. Guy's Hospital and Iggulden v. May* (*ante*, p. 965).

In one case it was held that a lessor and his ancestors had, by their own acts of successive renewals, construed a covenant in a lease for lives to be for a perpetual renewal, and that he was, therefore, bound by it: *Cook v. Booth* (1778) Cowp. 819. But in a subsequent case, this method of construing the covenant by the equivocal acts of the parties was repudiated: *Bayham v. Guy's Hospital*, *ante*, p. 965.

### *The Loss of the Right of Renewal.*

Lessees of the ground floor of a building covenanted to heat the upper rooms. The lease gave a right of renewal for one year but provided the covenant for renewal should become void in the event of any breach of the lessees' covenant. The lessees failed properly to heat the upper rooms; the heating apparatus was in good working order and it was held they had so broken their covenant as to lose their right to a renewal: *Nankin v. Starland, Ltd.* (1910) 15 W. L. R. 520 [Alta.].

*Waiver of Breach of Covenant Entitling Landlord to Refuse to Renew.*

In *Yukon Trust Company v. Murphy* (1905) 2 W. L. R. 298 (Y. T.), it was held on the facts that the tenant had exercised his option of renewal and that he was bound by the option (*qu. acceptance?*). It was held also, on the facts, that there had been no acceptance of a new tenant by the landlord and so no surrender by operation of law and no estoppel.

In *Fitzgerald v. Barbour* (1908) 17 O. L. R. 254; 11 O. W. R. 390 [Meredith, C.J.]; 12 O. W. R. 807 [C. A.], affirmed (1909) 42 S. C. R. 254, *sub nom. Loveless v. Fitzgerald*, a lease under the Short Forms Act contained a covenant not to assign or sublet without leave and further provided that the lessor, if the lessees should have duly kept all covenants, etc., in the lease and have given to the lessor six months before the expiration of the term created, written notice that the lessees required a further term, would "allow the lessees to occupy the said premises for a further term of five years . . ." The covenants were broken in the circumstances set out at p. 959, and by one of the lessee partners assigning all his interest to the other, agreeing, however, to join in the renewal lease if required. Held, that this latter fact did not take the case out of *Varley v. Coppard* (1872) L. R. 7 C. P. 505 (approved in *Horsey Estate, Limited v. Steiger* [1898] 2 Q. B. 259; *Langton v. Henson* (1905) 92 L. T. 805): that the right to renewal had been lost and that there had been no waiver by the acceptance of rent—notice to the landlord's agent of the dissolution of the partnership not being notice of the assignment of the lease, as to which the landlord knew nothing. Meredith, C.J., at p. 257, also said: "Taking this view it is unnecessary to consider whether the acceptance of the rent with knowledge of breach would disentitle the landlord to rely on the breach as ground for refusing to renew: *Finch v. Underwood* (1876) 2 Ch. D. 310, appears to be in favour of the landlord on this point, the reason for the decision being that

suggested by Mellish, L.J., at p. 314: "Receipt of rent waives a forfeiture because it admits the lease to be subsisting; but does it follow from that that a condition precedent to granting a new lease is waived? It will be noticed that what was treated as a covenant for renewal does not contain any words of covenant by the lessor as to what she will do in the event of the notice for which the covenant provides being given."

In *Nankin v. Starland* [*ante*, p. 970], it was held there had been no waiver.

### *Damages for Failure to Renew.*

See *Sunderland Athletic Association v. Toronto General Trust Corporation* (1919) 16 O. W. N. 293 [Logie, J.].

### *Rent on Renewal.*

Where a renewal clause provides that a rent for the new term is to be agreed upon or fixed by arbitration important questions sometimes arise—usually, however, upon the construction of the contract made by the parties.

The principles applied are outlined in the following cases:

In *Re Allen and Nasmith* (1900) 27 A. R. 536; 20 Occ. N. 425; 31 O. R. 335; 20 Occ. N. 139, a lease of land upon which were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years" at such rent as may be agreed on or fixed by arbitration, "such renewal lease to contain a like covenant for renewal." Armour, C.J.O., adopted the language of Robinson, C.J., in *Van Brocklin v. Brantford* (1861) 20 U. C. R. 347. "We think we must consider that if the defendants had found themselves in a situation to grant a renewal lease, as they had undertaken to do, the rent to be fixed by arbitration for (10) years to come *would* (by which I mean that it *should*) have been rent estimated upon the ground rent that could be justly charged during



that period, not taking into account the buildings. I take that to be the usual course in all such cases, where there is nothing in the terms of the original lease more special than there was in this. To take the value of the buildings into consideration in fixing the renewal rent would be making the tenant pay interest at once upon an expenditure made by himself."

*In re Geddes and Garde, In re Geddes and Cochrane* (1900) 32 O. R. 262; 20 Occ. N. 455 (Rose, J.) and in *Re Geddes and Cochrane* (1902) 3 O. L. R. 75; 22 Occ. N. 54; 1 O. W. R. 15 (Div. Ct.), it was laid down that where there was a covenant for renewal at an "increased" rent to be determined by arbitrators the arbitrators were bound to award an increased rent irrespective of what the evidence might establish as to the rental value of the premises at the time of arbitration, but if there was no increase in rental value the increase in rent might be nominal only. Under the leases in question the yearly rent increased from time to time during the term. Held, that the increase should be with reference to the whole term and not an increase over the annual rent payable during the last or any other period of the former term.

*In Denison v. Foster* (1908) 18 O. L. R. 478; 12 O. W. R. 1066, 1106; 29 C. L. T. 217, it was laid down by Riddell, J. (482)—that in fixing the rental to be paid upon a renewal of a lease it is not improper to take into consideration the potential value of the property; the landlord is entitled to a rental fairly based upon the value which the property may fairly be made to assume. He also held that the Referee in fixing the rent did not err when he did not provide for the reimbursement in whole or in part to the tenant for the buildings. The renewal lease gave a further right of renewal and he said, p. 482, "it may well—and probably will—be that the tenant will continue to own these buildings for many years more. It is possible there will be no buildings at all at the end of the present term or of the whole tenancy, and it would not be reasonable to compel the landlord to pay for what he may not get and has no means of compelling the tenant to give him."

The landlord may give evidence for the purpose of showing the demised property to be of greater value for some other uses than that to which it has in the past been put, uses to which it may and can be put by the tenant, and to go fully into all matters—not too remote—bearing on the question: *Re Toronto General Hospital Trustees and Sabiston* (1916) 9 O. W. N. 75; 38 O. L. R. 139; 27 O. W. R. 515 [App. Div.].

*Semble*, per Lennox, J., in *Toronto General Hospital Trustees and Sabiston*, where the lease provides for the payment of taxes by the lessee in addition to the rent, the fact that increased taxation may be imposed if the lands are used for new purposes may not be taken into consideration in fixing the rent: see his remarks at p. 147.

The lessors were unable to renew owing to a decree of the Court declaring that they had no power to grant the lease. The buildings, which were of wood, were removed, and sold under an execution against the plaintiff, who had purchased the term two years before it expired for \$3,000. In an action against the lessors on their covenant to renew, it was held that the plaintiff was entitled to recover the value of the occupation of the premises with the buildings above the probable ground rent for the term which he had lost, and that \$2,500, the amount of the verdict found, was not excessive: *VanBrocklin v. Brantford*, (1861) 20 U. C. R. 347.

### *Arbitration, Submission, Award and Practice.*

#### *Arbitration or Valuation.*

In *Gray v. McMath* (1902) 1 O. W. R. 445, it was held that where the lease provided for an arbitration to fix the rent the intention of the parties was that there should be a valuation and not an arbitration in the strict sense; the new lease was to be for only five years and the former rent was only \$40 a month.

In *Re Irwin and Campbell* (1913) 4 O. W. N. 1562; 5 O. W. N. 229 [C. A.], it was held on appeal from Middle-

ton, J., that the leases in question provided for a valuation and not an arbitration.

The difference between arbitration—a judicial or *quasi-judicial* proceeding—a trial out of Court—a substitute for the ordinary method of trial and a mere valuation, is set out by Lennox, J., in *Campbell v. Irwin* (1914) 32 O. L. R. 48 [App. Div.], at pp. 54 and 55, and by Hodgins, J.A., at pp. 61, 62.

The Court held in a case decided upon peculiar and unusual circumstances that the valuers, who had no power to take evidence upon oath, might accept *ex parte* statements and make individual inquiries to assist them without invalidating the valuation. The Court did not decide that the rule excluding *ex parte* statements in cases of arbitration would not be applicable to ordinary cases of valuation. The judgment of the Supreme Court, noted at p. 990, did not impeach this portion of the judgment.

A building lease contained the following covenant: "The lessor for himself, his heirs, and assigns, doth covenant and agree to and with the said lessee, his heirs and assigns, that at the expiration of this lease the buildings on the demised premises shall be valued by disinterested persons, and he will then either pay for them at such valuation or continue the lease to a further term at the same annual rent at the option of the said lessor." It was held that as the valuation provided for was not an arbitration, but a mere appraisalment, the lessor could himself appoint the valuers so long as they were disinterested: *Gilbert v. Smith* (1878) 18 N. B. R. 211.

See also *Clarkson v. Plastics Limited* (1917) 11 O. W. N. 260 [Middleton, J.].

### *The Submission.*

*In re Allen & Nasmith* (1900) 27 A. R. 536; 20 Occ. N. 425, Armour, C.J.O., held that questions arising upon the lease itself should not be affected by the terms of the submission, "it being clear that the parties to it never intended that the terms of the lease should be thereby altered or varied."

A lease, even though approved by the Court, is the contract of the parties, and where such a lease provided for the renewal rent to be fixed by the Master-in-Ordinary this term of the contract might be—and was in this case—waived by the parties who appeared and called witnesses before the official Referee of the Supreme Court of Judicature: [whom an order of the Court purported to give all the powers formerly possessed by the Master-in-Ordinary] that the arbitrator was a person agreed upon by the parties and was not a Court, that what was done was an informal submission to Mr. Cartwright (the Referee): the proceedings were not *coram non judice* and such cases as *Farquharson v. Morgan* [1894] 1 Q. B. 552, did not apply: *Re Denison and Foster* [*ante*, p. 973].

In *Farley v. Sanson* (*ante*), it was held that the appointment of an arbitrator by the lessees in the circumstances set out at p. 956, *ante*, was a valid appointment and the lessor was restrained from proceeding before a sole arbitrator appointed by himself as in default of the lessee making an appointment.

### *The Interpretation of the Lease.*

In Ontario a tenant who, after the arbitrators have been appointed, desires to have the Court interpret the provisions of a lease containing a submission to arbitration, is not entitled to apply under Rule 604 by originating notice: the case should be worked out under the Arbitration Act, R. S. O. 1914, c. 65; no doubt the arbitrators will, at the request of either party, state a case for the opinion of the Court, or make their award in such a way as to obtain the opinion of the Court. If the arbitrators think the lease should be interpreted. . . before they proceed with the reference, they have the remedy in their own hands and can state a case: (s. 29 Arbitration Act) per Middleton, J., at p. 316; in *Re Toronto General Trusts Corporation & McConkey* (1917) 41 O. L. R. 314; 13 O. W. N. 281; and see *Re McConkey Arbitration* (1920) 17 O. W. N. 329 [Sutherland, J.]; 18 O. W. N. 171 [App. Div.].

*Practice.*

In Ontario a case submitted by arbitrators may be heard by a single Judge: *Re Geddes & Cochrane* (1901) 2 O. L. R. 145; not applicable since repeal of R. S. O. (1897) c. 51, s. 67 (1) (a) [Judicature Act]; *Re McConkey Arbitration* (1918) 42 O. L. R. 380; 43 D. L. R. 732; 14 O. W. N. 31 [Middleton, J.].

*Appeal.*

A party taking part in an arbitration and adopting the proceedings cannot raise in an Appellate Court for the first time the contention that as he was merely the assignee of a lease, which he had assigned as security, and therefore there being no privity or contract or estate between the parties, the award was a nullity, and *semble*, per Lennox, J., who distinguished *Jameson v. London & Canadian Loan and Agency Co.* (1897) 27 S. C. R. 435, this contention is not well founded: *Re Toronto General Hospital and Sabiston* [p. 973, *ante*].

There is no appeal from the arbitrators' finding of fact, *ib.*, and see *Re Watson & City of Toronto* (1916) 38 O. L. R. 103, and cases noted as to the principles governing appellate tribunals on such appeals.

An award may be set aside notwithstanding it follows the opinion of the court on a case stated under the Arbitration Act: *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. of London* [1912] 3 K. B. 128; [1912] A. C. 673, followed in *Re McConkey Arbitration* (1920) 47 O. L. R. 411; 18 O. W. N. 171 [App. Div.].

A lease providing for valuation of buildings at the end of the term which expired October 31st, 1900, also provided that the award was to be made within the six months next preceding Nov. 1st, 1900, and the amount found was to be paid within six months from that date, with interest at seven per cent. from that date. Valuers were appointed but the time for making the award was extended, and the award was not made until about November 30th, 1901. Possession had been given on

October 31st, 1900. It was held that as the buildings on the premises were distinctly recognized as the property of the tenant to be taken over by the landlord at the expiration of the lease—the latter was in the position of a purchaser in possession, and that the tenant was entitled to interest at seven per cent. from November 1st, 1900—Britton, J., saying, “the test as to payment of interest seems to me to be the possession”: *Toronto General Trusts Corporation v. White* (1902) 3 O. L. R. 519; 22 C. L. T. 178; 1 O. W. R. 198 [Div. Ct.]. The Court of Appeal (1902) 5 O. L. R. 21, varied this, giving interest from October 31st, 1900, to November 30th, 1901, for the first six months, at seven per cent., and for the remainder of the time at the legal rate of five per cent.

It was provided in a lease that if the lessee should desire a renewal for a further term and give a defined notice containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators or a majority of them. It was held that the costs of the renewal were provided for both by law and by the above clause, and must be borne by the lessee, but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference and one-half of the arbitrators' fees: *Smith v. Fleming* (1888) 12 P. R. 520, 657.

In *In re Mostyn and Fitzsimmons* (1903) 19 T. L. R. 191; 23 C. L. T. 97, a covenant in the lease was held to throw upon the tenant the liability to pay the costs of an arbitration to fix a renewal rent.

Surrenders for the purpose of renewal have already been dealt with, at p. 689, *ante*.

### *Renewal of Leases by Absentees.*

“Where any person who, in pursuance of any covenant or agreement in writing, if within Ontario [Saskatchewan] and amenable to the process of the Supreme Court, might be compelled to execute any lease by way of

renewal, is not within Ontario [Saskatchewan], or is not amenable of the process of the Court, the Court on motion of any person entitled to such renewal, whether such person is, or is not, under any disability, may direct such person as the Court thinks proper to appoint for that purpose to accept a surrender of the subsisting lease, and to make and execute a new lease in the name of the person who ought to have renewed the same."

R. S. O. 1914, c. 155, s. 63 (1); 1 Geo. V. c. 37, s. 63; 9 Geo. V. [Sask.] c. 79, s. 51 (1).

Taken originally from 11 Geo. IV. and 1 Wm. IV. c. 65, s. 18 [Imp.].

"A new lease executed by the person so appointed shall be as valid as if the person in whose name the same was made was alive, and not under any disability, and had himself executed it."

R. S. O. 1914, c. 155, s. 63 (2); 9 Geo. V. [Sask.], c. 79, s. 51 (2).

"In every such case it shall be in the discretion of the Court to direct an action to be brought to establish the right of the person seeking the renewal, and not to make the order for such new lease unless by the judgment to be made in such action, or until after it shall have been entered."

R. S. O. 1914, c. 155, s. 63 (3); 9 Geo. V. [Sask.], c. 79, s. 51 (3).

"A renewed lease shall not be executed by virtue of this section in pursuance of any covenant or agreement unless the sum or sums of money, if any, which ought to be paid on such renewal, and the things, if any, which ought to be performed in pursuance of such covenant or agreement by the tenant, be first paid, and performed, and counterparts of every such renewed lease shall be duly executed by the tenant."

R. S. O. 1914, c. 155, s. 63 (4); 9 Geo. V. [Sask.], c. 79, s. 51 (4). Taken from 11 Geo. IV. and 1 Wm. IV. c. 65, s. 20 [Imp.].

"All sums of money, which are had, received, or paid for, or on account of, the renewal of any lease, by

any person out of Ontario [Saskatchewan], or not amenable to the process of the Supreme Court, after a deduction of all necessary incidental charges and expenses, shall be paid to such person, or in such manner, or into the Supreme Court to such account, and be applied, and disposed of, as the Court shall direct."

R. S. O. 1914, c. 155, s. 63 (5) ; 9 Geo. V. [Sask.], c. 79, s. 51 (5). Taken from 11 Geo. IV. and 1 Wm. IV. c. 65, s. 21 [Imp.].

"The Court may order the costs and expenses of, and relating to, the applications, orders, directions, conveyances, and transfers, or any of them, to be paid and raised out of, or from the land, or the rents, in respect of which the same are respectively made, in such manner as the Court shall deem proper."

R. S. O. 1914, c. 155, s. 63 (6) ; 9 Geo. V. [Sask.], c. 79, s. 51 (5). Taken from 11 Geo. IV. and 1 Wm. IV. c. 65, s. 35 [Imp.].

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 107, ss. 51 to 55.

### *Renewals by Persons Under Disability.*

#### *Infants.*

By the Ontario Infants' Act, R. S. O. 1914, c. 153, s. 9 "Where any person under the age of twenty-one years, might, in pursuance of any covenant or agreement if not under disability, be compelled to renew any lease made for the life or lives of one or more person or persons, or for any term or number of years absolute, or determinable on the death of one or more persons, such infant, or his guardian in the name of such infant, by the direction of the Supreme Court, to be signified by an order made upon the application of such infant or his guardian, or of any person entitled to such renewal, from time to time, may accept of a surrender of such lease, and may make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for



such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise as the Court by such order shall direct.”

Taken from [Imp.] 11 Geo. IV. and 1 Wm. IV. c. 65, s. 16. Sections 10, 11 and 12 of the Ontario Act are taken from ss. 20, 21 and 31 of the Imperial Act already noted at pp. 693 and 979. Reference should also be made to the provision made for Surrender and Renewal considered at p. 693, *ante*.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 107, ss. 46 to 50.

### *Lunatics.*

Similar provisions affecting renewals on behalf of lunatics are contained in R. S. O. 1914, c. 68, ss. 16 and 17; (1918) 8 Geo. V. [Sask] c. 58, s. 17, and see the statutes noted at pp. 52, *et seq.*, *ante*.

### *Renewals by Church Corporations.*

See the statutes noted at p. 36, *ante*.

### *Renewals by Trustees.*

See C. S. N. B. 1903, c. 162, s. 15 (1).

### *Valuation of Buildings and Improvements.*

It appears advisable to consider here the questions arising where the value of buildings and improvements is to be ascertained at the end of a term either because the lessor refuses to renew or pursuant to provisions to that effect in leases which do not provide for renewals.

A lessee covenanted to build on the demised premises during the term, “provided always, and it is the true intent and meaning of these presents and the parties thereunto, that at the expiration of the demise the build-

ings erected shall be paid for at the valuation of two indifferent persons," and this was held a covenant to pay: *McFattridge v. Talbert* (1845) 2 U. C. R. 156.

Where there is nothing said as to how a valuation of buildings at the end of the term is to be made, the lessor who has to pay may make it and tender the amount to the lessee, subject to its being afterwards found reasonable by the Court or jury: *Nudell v. Williams* (1866) 15 U. C. C. P. 348.

A covenant that the lessor would, at the expiration of the term, pay the lessee, his heirs or assigns, a valuation for his buildings on the land demised, is not wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but the increased value of buildings subsequently erected in consequence of the fire can be claimed at the expiration of the term against the landlord: *Re Haisley* (1882) 44 U. C. R. 345.

In *Dalton v. Toronto (City)* (1906) 12 O. L. R. 582; 26 C. L. T. 582; 8 O. W. R. 154 [C. A.], the lease considered contained a provision for payment by the lessor for buildings and permanent improvements at the end of the term in case the lessor should refuse to renew, the amount to be settled by arbitration. "Filling in" was held to be a "permanent improvement" for which, in a proper case, the tenant would be entitled to payment, but that in this case evidence properly admitted to define the term permanent improvements showed that the improvement in dispute was really made by the landlord. The payment provided for was to be "such reasonable sum as the buildings and permanent improvement made and erected . . . shall then be worth; such value to be determined," etc. Held, that, in the circumstances, "worth" meant "a fair and reasonable market value, as would result from the bringing together of a willing buyer and a prudent seller."

"Buildings and erections" does not include earth-filling: *Adamson v. Rogers* (1895) 22 A. R. 415, affirmed; (1896) 26 S. C. R. 159, followed.

The decision of the Court of Appeal in *Adamson v. Rogers* is criticised in an article in (1895) 15 C. L. T. 264, probably by E. D. Armour, K.C.

“Building structure or erection,” see *Lavy v. London County Council* [1895] 2 Q. B. 577; 64 L. J. (M. C.) 262; 15 C. L. T. 284.

W. leased to M. certain property for 10 years. The lease provided that the tenant should erect a certain building; that all improvements “shall become the absolute property of the lessor subject to this lease, but at the expiration of the said term, the lessor agrees to purchase from the lessee the building . . . after an annual reduction of 5 per cent. on the cost value thereof, per year is made for the depreciation in value.” M. erected the building and after about three years’ possession W. distrained for arrears of rent, and realized a sum slightly in excess of the arrears. M. abandoned the premises and W. re-entered. C. having issued a garnishee summons against W. in an action against M., W. paid into Court the balance in his hands realized under the distress. C. contending that W. was also indebted to M. in the value of the building erected by M. as provided by the lease, an issue was directed to determine the question.

*Calgary Brewing and Malting Company v. Williams* [1919] 1 W. W. R. 653; [1919] 2 W. W. R. 919; 8 D. L. R. 224; 12 Sask. L. R. 318, *held* (reversing the decision of the trial Judge and following *Bevan v. Chambers* (1896) 12 T. L. R. 417), that W. was liable.

An arbitration was taken under a lease dated the 1st November, 1896, made by Richardson to Wilson. In this lease was a covenant by the lessor to pay, after the expiration of the term, “the just and proper value at that time (namely at the expiration of the said term) of such buildings and improvements as may then be erected and standing on the said hereby demised premises”—such value to be determined by arbitration—or grant a new lease at a rental to be determined by arbitration. The arbitration was to fix the value of the buildings.

The lease also contained this proviso: "Provided always that in determining the amount of the worth or value of any buildings, erections or improvements standing and being upon the said demised premises at the end of any twenty-one years the said arbitrators are to judge of such buildings, erections and improvements abstractedly and without reference to site or renewal value, but are only to consider the cost of erection and deducting for age, decay and wear and tear and damage sustained." Middleton, J., pointed out [p. 382] that the tenant might refuse to renew, and in that case the lessor was to pay two-thirds of the value of the buildings and improvements upon the demised premises, to be determined in the same way. The expression used in the covenants to pay in the alternative events was the same—to pay the value (or two-thirds of the value) of "such buildings and improvements" as might be upon the premises at the expiry of the term. There was (1) a covenant to keep and maintain on the demised premises one or more stores or houses, to be composed of good brick, stone, or iron, and other substantial material, of the value of not less than \$4,000; and in the same clause, a covenant to insure the store and houses now erected and "all future erections," (2) the above covenant to pay, and a proviso for arbitration whenever there was any question touching the value "of any buildings, fixtures or things now or hereafter to be erected or being on the demised premises," and (3) the above proviso as to the way in which the value of "any buildings, erections or improvements" was to be determined. Middleton, J., said, p. 382: "I cannot bring myself to the view that the use of these varying expressions modifies or controls the words of the main covenants, or that the words actually used in these covenants are to be read as modified or controlled by the expressions in the other parts of the lease. The covenant is to pay for 'buildings and improvements' and these are the words that must be interpreted, and not 'buildings, fixtures and things' or 'buildings, erections and improvements.' Nor should the words actually

used in the covenant to pay be cut down from their natural meaning so as to exclude . . . all that might be more aptly described as 'fixtures and things' or as 'erections,' because these words are found in other parts of the lease, and not in the covenant in question. The texture of the whole document is too lax for that. . . . The first question relates to the proviso as to the mode of valuation quoted . . . The main covenant affords the key — the landlord is to pay 'the just and proper value at that time,' *i.e.*, the expiry of the lease, and this value is to be determined in accordance with the proviso. This requires the 'worth or value' of the buildings to be determined:—

“(a) ‘Abstractedly.’

“(b) Without reference to site or renewal value.

“(c) On the basis of ‘cost of erection,’ less depreciation.

“From this proviso, I do not gather any intention to depart from the requirement of the covenant that the value shall be the just and proper value at the expiration of the lease, but rather an intention to exclude from the consideration of the arbitrators the element of suitability for the particular site and the ‘renewal value’ of the buildings. This is what is meant by the unusual phrase ‘abstractedly.’ The value is to be judged in the abstract, apart from the local situs or particular use, and upon the basis of cost only. It was not the intention to give to the landlord any advantage arising from increase in value of materials, etc., nor to saddle upon him any loss due to the decrease in value or the improvident bargain of the tenant. ‘Renewal value’ does not mean cost of replacement, but the value upon the renewal of the lease, as a factor in determining his rent. The second question is: ‘Are the arbitrators to include only such buildings and erections as will be a benefit to the demised premises and to the owner thereof and to exclude improvements made or erected by the lessee for his special business purposes and which are of value only to a person who may carry on a similar business to that

carried on by the lessee at the termination of his tenancy?' The covenant is to pay the value of all 'buildings and improvements' erected and standing on the demised premises, to be determined in the manner pointed out in the proviso. The element of use and value to the landlord or any new tenant is not a factor in the valuation. Next the question is asked, 'Are fixtures, buildings and improvements within the covenant?' According to *West v. Blakeway* (1841) 2 M. & G. 729; 133 E. R. 940, 'improvements' is a word of large significance; and, when it is used in a lease, it is intended to have a wider and less technical operation than the word 'fixtures.' I do not think this would cover purely chattel property, but that due weight must be given to the other words used, 'erected and standing on the . . . demised premises'; and that all that in any fair sense falls within this description, without entering into any technical discussion as to landlord's fixtures, tenant's fixtures, or trade-fixtures, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord": *Re McConkey Arbitration* (1918) 42 O. L. R. 380; 43 D. L. R. 732; 14 O. W. N. 31 [Middleton, J.].

Following this opinion the arbitrators made an award: Sutherland, J. [(1920) 17 O. W. N. 329], refused to set it aside and his decision was affirmed: *Re McConkey Arbitration* (1920) 47 O. L. R. 411; 18 O. W. N. 171 [App. Div.].

In *Canadian Anthracite Coal Co. v. W. McNeill Co.* (1912) 2 W. W. R. 638; 21 W. L. R. 682; 4 D. L. R. 784 [Alta.—Ct. en B.], special provisions for appraising improvements added by the lessee to coal lands were construed.

"Under ordinary circumstances, the revenue derived from a building during a long period would be of assistance to an arbitrator in determining its value, yet there might conceivably, and in this case there may be, circumstances not yet developed that would show that no assistance whatever was afforded by having that information

before the arbitrators," per Meredith, C.J.C.P., in *Rogers v. London and Canadian Loan and Agency Co., Ltd.* (1908) 18 O. L. R. 8; 12 O. W. R. 1295 [Div. Ct.], at p. 11, where the Court directed an arbitrator to admit such evidence. A question of the admissibility of evidence is a matter of law within the meaning of the Arbitration Act.

In *P. Burns & Co., Ltd. v. Godson*, the facts were that the defendant on February 1, 1911, leased to the plaintiff a certain building in Vancouver for a term of five years at a rental of \$1,000 per month, the lessee to have the privilege "of renewing said term for a further term of five years from the first day of April, 1916, upon such term as may be mutually agreed upon between the parties hereto, and further upon the lessee giving to the lessor a notice in writing of the lessee's desire to renew same as aforesaid, which said notice shall be given at least three months before the expiration of the term hereby granted."

It was stipulated that the lessee should make "such alterations to the front, and such alterations and additions to the interior of the building hereby demised as in the opinion of the lessee shall be necessary for the requirements of its business, provided, however, that the plans and specifications of any such alterations and additions shall be submitted to and approved by the lessor."

It was agreed that the lessor would pay to the lessee, during the second year of the term of the lease, the sum of \$5,000, "which sum shall be accepted by the lessee in full of all claims or demands of the lessee against the lessor for any and all alterations hereafter made to the building by the lessee as aforesaid."

Notwithstanding this specific stipulation, however, the lease immediately added that "in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such a case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of \$5,000. Provided, however, that

such total cost shall not in any case exceed the sum of \$20,000.”

On December 28, 1915, the plaintiff gave formal written notice to the defendant of his desire to renew the lease, and that he was ready and willing to enter into negotiations with a view to the settlement of the terms of such renewal. The negotiations took place, but the demands of the defendant were exorbitant. After the plaintiff gave notice of its intention to move out, the defendant offered to accept terms previously submitted by the plaintiff but the plaintiff now refused to renew and brought an action for the cost of the alterations and additions. The action was maintained by Gregory, J., [1917] 3 W. W. R. 966 [B.C.], the Court of Appeal [1918] 3 W. W. R. 587, and the Supreme Court of Canada [1919] 1 W. W. R. 848; 39 C. L. T. 247, *sub nom. Godson v. P. Burns & Co., Ltd.* (1919) 58 S. C. R. 404; 46 D. L. R. 97.

Anglin, J., said, at p. 848: “For the reasons stated by Mr. Justice Martin ([1918] 3 W. W. R. 587) I am satisfied that the failure to renew the respondent’s lease entitled him to recover the \$15,000 in question in this action. If reasonableness of conduct were a consideration that should enter into the matter I would agree with the view of the Chief Justice of the Court of Appeal ‘that the lessee [had] *bona fide* endeavoured to bring about an agreement on reasonable terms of renewal.’ ”

“I also concur in the view of the Chief Justice that the learned trial Judge came to the right conclusion as to the construction of what he terms the 5th clause of the lease, which immediately follows the short form covenant for quiet enjoyment, and that the respondent was entitled to remove the tenant’s *fixtures* which it took away from the premises. They formed no part of the ‘alterations to the front’ and ‘alterations and additions to the interior of the building’ for which the appellant agreed to pay a sum not exceeding \$20,000 in the event of non-renewal. Applying the rule *noscitur a sociis* the words ‘fixtures’ in the clause of the lease in question, having regard to the improvements and alterations with which it is con-



nected, must be restricted to what are ordinarily known as landlord's fixtures."

Certain property, chiefly consisting of mud-flats, was held under a lease which contained a covenant whereby the lessors had agreed to pay the appraised value of any "buildings or erections for manufacturing purposes" erected by the lessees during the currency of the lease. Upon expropriation proceedings being taken by the City of St. John, the lessor, it was decided by the Supreme Court (*Sleeth v. City of St. John* (1908) 38 N. B. R. 542; 5 E. L. R. 391; (1908) 39 N. B. R. 56), that the words "buildings or erections for manufacturing purposes" in the covenant included all piling and capping placed on the land by the lessees in use, or capable of being used as a foundation for buildings for manufacturing purposes even if there were no buildings actually thereon at the time the land was expropriated, and also all filling done by the lessees with the intention and effect of strengthening such foundations. An appraisalment under the lease was subsequently made in which the arbitrators excluded from their consideration the value of such filling as had been done by the lessees. Upon proceedings in equity to set aside the appraisalment a decree was made setting the same aside, but declaring that the words "erections" and "buildings" in the lease did not include "any piling, capping or woodwork on the said demised lots, or the filling in of the same, except where such piling, capping or woodwork" was on the date of expropriation "in actual use as a foundation for a building for manufacturing purposes." The Supreme Court (on an appeal by the lessees) held that the decree should be amended so as to make it clear that the lessees were entitled to compensation for all piling, capping, woodwork or filling in which on the date of expropriation was in actual use or intended for actual use as a foundation for a building erected or intended to be erected for the same: *Gordon v. St. John; Quinlan & Gordon v. St. John* (1911) 10 E. L. R. 437; 40 N. B. R. 541; 3 D. L. R. 1.

This decision was reversed by the Supreme Court of Canada, which held that the lessees were entitled to be

paid the value of piling and filling in on said lots to form a foundation for buildings erected and in existence at the expiration of the lease, but not for such piling and filling in at a place where no buildings existed but on which buildings were intended to be erected for manufactures: *St. John v. Gordon*; *St. John v. Quinlan* (1912) 11 E. L. R. 177; 32 C. L. T. 599; 46 S. C. R. 101.

Middleton, J., held, that the whole parcel was what was to be considered in the valuation of the buildings and any right which the sub-tenant might have was a question between himself and the lessee of the whole parcel: *Ramsay v. Proctor* (1914) 26 O. W. R. 414; 6 O. W. N. 428.

Two leases of adjoining lots were, by assignment, vested in C. In each lease there was a provision that if the lessor refused to renew he should so notify the lessees, and the buildings on the land should be valued by valuers. Notice was given under each lease and the valuers without any objection on the part of the lessor's counsel valued the buildings on the two lots as a whole. The Supreme Court held, reversing the Appellate Division (1914), 32 O. L. R. 48; Davies, and Anglin, JJ., dissenting, that the valuation should be set aside as the building on each lot should have been valued separately, and applying the principle of *Cameron v. Cuddy* [1914] A. C. 651, that an action for payment of the valuation should not be dismissed, but that the same or other valuers should be appointed to make a valuation in a proper manner: *Campbell v. Irwin* (1915) 51 S. C. R. 358.

The importance of this decision lies in the fact that the lessor held under two leases of the property, each from different lessors: of one she had a right of renewal, but she had lost the right in respect of the other. The buildings built on the land were built over the dividing line between the two properties. The lessor had sold the right of renewal and the buildings on the one lot and had consequently refused to renew her lease to the sub-lessee, and the value of the sub-lessee's holdings had to be ascertained in this valuation.

An action of covenant was brought by the assignee of a lessee against the lessor on a lease of land for eleven years from the 1st February, 1830, for not appointing an appraiser to value the buildings after the expiration of the term; and notice was alleged to the defendant on 3rd May, 1843, that the plaintiff had chosen an appraiser on his part, and request then made to the defendant to appoint an appraiser on his part. The defendant pleaded that from the end of the term, namely, 1st February, 1841, until the 18th of May, 1841, he was ready and willing to appoint an appraiser, and on the latter date he conveyed all his interest in the premises to B. and C., after which the latter became the only person capable in law to perform the covenant, of which the plaintiff had notice, and that B. and C. have ever since been ready to perform the covenant, but that the plaintiff had not applied to them to appoint an appraiser. This plea was held bad, for there was nothing to show that the relation of landlord and tenant continued after 1st February, 1841, or that plaintiff was in possession, or that there was any privity of estate at the time of the assignment, or that the assignment was of a reversionary and not a possessory estate, or that B. and C. were liable to perform the covenant: *Ansley v. Peters* (1845) 4 N. B. R. 593.

In an action by the assignee of a lease against the lessor on a covenant to pay for improvements according to valuation, the plaintiff is entitled to interest on the amount appraised from the time it becomes payable, though there is no statute awarding interest, and if the lessor refuse to appoint an appraiser, the jury may allow interest on the value of the improvements as part of the damages: *Ansley v. Peters* (1849) 6 N. B. R. 339.

An agreement of reference to ascertain the value of buildings at the end of the lease, provided that if the lessor should elect to pay for the buildings instead of renewing for a further term of twenty-one years, he should pay the sum awarded within a week after the award. The lessee had mortgaged the term, and with the consent of the mortgagee the lessor delayed payment

more than a week; and it was held that this did not deprive him of the right of election so as to enable the lessee to hold for a further term of twenty-one years, because the mortgagee as assignee of the original term, being the proper person to receive the money, had power to extend the time: *Roaf v. Garden* (1873) 23 U. C. C. P. 59.

An owner in fee demised for seven years and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He then devised the land to trustees for a term of 1,000 years upon trust to raise money in aid of his personal estate for payment of debts, etc., and subject thereto to the plaintiff for life with divers remainders over. The plaintiff took possession on the testator's death, but a new tenant could not be found. The plaintiff then paid the outgoing tenant for his property; and it was held that the liability to pay attached to the land, and the landlord for the time being was the person primarily liable, and the plaintiff being in receipt of the rents and profits was the landlord, and not the trustees of the term: *Mansell v. Norton* (1883) 22 Ch. D. 769; 52 L. J. (Ch.) 357; 48 L. T. 654; see also *Bradburn v. Foley* (1878) 3 C. P. D. 129; 47 L. J. (C.P.) 331; 38 L. T. 421.

### *Costs.*

See on this subject: *Dalton v. Toronto (City)* (1906) 12 O. L. R. 582; 8 O. W. R. 154; 26 C. L. T. 582.

### *Options to the Lessee to Purchase the Fee.*

Leases frequently contain a covenant by the lessor that if the lessee give notice in writing within a certain period that he desires to purchase the fee simple or whatever interest the lessor may have in the demised premises, the lessor will on payment of a certain price—and sometimes upon the fulfilment of certain specified conditions—convey the demised premises or the lessor's interest in them to the lessee.

A valid contract giving an option to purchase is not the less a binding contract because it is contained in a

lease and it creates an equitable interest in the land: *Woodall v. Clifton* [1905] 2 Ch. 257 [C.A.]; *London & South Western Railway Co. v. Gomm* (1882) 20 Ch. D. 562 [C.A.].

The question as to whether an option creates an interest in the land has been the subject of much consideration, particularly in Articles in 39 Sol. J. 618; (1915) 35 C. L. T. 798; 42 Sol. J. 628 [Mr. Cyprian Williams]; (1916) 36 C. L. T. 446 [both by Mr. C. C. McCaul, K.C.], and (1918) 38 C. L. T. 242, 322 [both by Mr. Walter S. Scott]; by E. D. Armour, K.C. [Devolution], and see an Article in (1896) 16 C. L. T. 218 [by Mr. John H. Moss].

The correctness of the proposition stated above seems, generally, to have been accepted. And it is not proposed further to consider a question which is not part of the law of landlord and tenant.

An option to purchase contained in a lease is binding, although no separate consideration is given for it, and the agreement is not under seal: *Youill v. White* (1902) 5 Terr. L. R. 275; 22 Occ. N. 312. In *Matthewson v. Burns* (1913) 30 O. L. R. 186 [App. Div.], Riddell, J., p. 203, quoted Hilliard on Vendors: "In case of such a covenant, allowing the lessee to purchase the fee, the law intends that the rent was fixed at the amount reserved, as an inducement to the purchase."

The language of Masten, J., in *Bennett v. Stodgell* (1915) 36 O. L. R. 45 [App. Div.], at p. 60, is to the same effect.

In *Moir v. Palmatier* (1900) 13 M. R. 34 [Ct. en B.], a lease and an agreement for sale simultaneously executed and delivered were held to be dependent one upon the other.

See also *Bradbury v. Grimble & Co., Ltd.*, p. 201, (*ante*).

### *The Option is Irrevocable.*

From the foregoing it follows that the option is irrevocable. In *Matthewson v. Burns* [*ante*], Riddell, J., at pp. 199 *et seq.*, considered the decisions and said,

p. 203, after citing Hilliard [p. 993, *ante*], "No authority has been cited to us and I can find none which supports the contention."

Among the cases considered was *Davis v. Shaw* (1910) 21 O. L. R. 474; 16 O. W. R. 273; 1 O. W. N. 191. There D. made a written offer to purchase certain land. S. accepted the offer by writing his agreement to sell beneath it, and added, "I also propose to give the purchaser an option of purchasing" another lot "for \$1,000." It was held there were two distinct agreements, but Falconbridge, C.J.K.B., in giving judgment, pointed out that the cases on options in leases had no application, adding, p. 481, "I think these are all cases of covenant under seal, at any rate they have no application to the point now under consideration."

Riddell, J., pointed out in *Matthewson v. Burns* that without the remark about covenant under seal the defence raised in *Matthewson v. Burns* would not have been heard of. He considered the United States cases holding that an option to purchase contained in a lease is not revocable and pointed out that they were not decided on the ground that the lease was under seal.

Riddell, J., also considered and distinguished *Maltezos v. Brouse* and *Miller v. Allen* (*infra*).

To the same effect is the opinion expressed but not decided in *Bennett v. Stodgell* (1915) 36 O. L. R. 45 [App. Div.].

In *Maltezos v. Brouse* (1911) 2 O. W. N. 990; 19 O. W. R. 6 [Div. Ct.], *Davis v. Shaw* (*supra*) was applied. B. agreed in writing to lease No. 71 to M. at \$50 per month and added, "we also agree to give [M.] the first privilege of leasing No. 73." A written lease was made of No. 71, which contained no reference to No. 73. It was held that the option was without consideration and could be revoked.

In *Miller v. Allen* (1912) 4 O. W. N. 346 [Middleton, J.], there was an option to purchase in a lease not under seal. An action for specific performance was dismissed on other grounds by the learned Judge, who said he considered himself bound by *Davis v. Shaw* and *Maltezos v.*

*Brouse*, and intimated that otherwise he would hold the option was enforceable.

*But the Right to Exercise it May be Waived.*

In *Matthewson v. Burns* (1913) 30 O. L. R. 186 [App. Div.], it was held that a tenant who before the expiration of her term under a lease containing an option accepted a new lease without an option, had abandoned any interest in the land which would be inconsistent with the relationship of landlord and tenant: that by signing the new lease the landlord had been induced to change his position and specific performance was refused [Reference to *Re Tyrer & Co. v. Hessler & Co.* (1901) 84 L. T. R. 653]. But on appeal it was held—Anglin and Brodeur, JJ., dissenting—restoring the judgment of Boyd, C., that there had been no waiver: “the taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase”: *Matthewson v. Burns* (1914) 50 S. C. R. 115; 34 C. L. T. 754.

The owners and the second mortgagees of land about to be sold under the first mortgage entered into a written agreement by which the second mortgagees were to buy in the land and then lease it to the owners for five years, the lease to contain a covenant that the lessee might “at any time during the said term exercise his right of pre-emption of . . . the premises.” The second mortgagees bought in the land but the owner refused to pay rent or execute the lease and went out of possession. It was held that the owner was only entitled to exercise his option *qua* lessee, and that his right of pre-emption ceased when the lease came to an end by his going out of possession. It was held that he was in possession until he went out by virtue of the agreement for a lease, and that his rights must be determined as if the formal lease were signed: *Guise-Bageley v. Vigers Sheer Lumber Co.* (1913) 4 O. W. N. 559; 9 D. L. R. 4; 23 O. W. R. 728.

*The Rule against Perpetuities.*

The question whether these options are subject to the rule against perpetuities has not been satisfactorily answered.

In *Woodall v. Clifton* [1905] 2 Ch. 257, Warrington, J., held that the option was invalid unless the interest so created rested within the limits allowed by the rule against perpetuities, and as in this case the option was exercisable during the running of the lease, a period of ninety-nine years, the plaintiff, the assignee of the lessee, could not succeed against the defendant, the assignee of the lessor. The Court of Appeal came to a similar decision, but on the different ground set out at p. 1086 (*post*).

Then in *Worthing Corporation v. Heather* [1906] 2 Ch. 532, the same judge in an action brought by lessees against the devisees of the lessor in respect of an option contained in a lease for thirty years, held that the option infringed the rule but gave damages for breach of the covenant to convey; and see *South Eastern Railway v. Associated Portland Cement Manufacturers* (1900) Ltd. [1910] 1 Ch. 12 [C.A.].

This decision is criticized by Mr. Cyprian Williams, 51 S. J. 648; see (1909) 29 C. L. T. 762, who argues that the option in such cases is altogether void, and damages should not have been given, and the subject is discussed at length in the various articles referred to at p. 993, (*ante*).

An informal lease in writing for three years contained an option to purchase, but no time was set for the exercise of the option. It was argued that the contract was void as being within the Rule against Perpetuities, giving as it did a perpetual right to buy the land; but the court held that the right to purchase was "limited by the term demised" (Meredith, C.J.C.P.); or in other words, "the term and option were co-terminous" (Masten, J.), and in the absence of a clause in the agreement preventing the court limiting the time during which the option was to be exercised, as in *Trevelyan v. Trevelyan* (1885) 53 L. T. R. 853, or in *London and South Western*



*R. W. Co. v. Gomm* (1882) 20 Ch. D. 562 [C.A.], the reasonable limitation was the three years during which the term was to run, or such time thereafter as the relationship of landlord and tenant on the terms of the lease should exist: *Moss v. Barton* (1866) L. R. 1 Eq. 474; *Buckland v. Papillon* (1866) L. R. 1 Eq. 477; L. R. 2 Ch. 67; *Bennett v. Stodgell* (1916) 36 O. L. R. 45 [App. Div.].

*All Conditions Precedent Must be Performed.*

If the agreement makes the doing of any act a condition precedent to the exercise of the option, that provision must be strictly observed.

Where the lessee has the privilege of purchasing the fee without any obligation upon him to do so, the contract rests upon a wholly different footing from an ordinary contract for sale and purchase of land and the lessee must show that he has performed all the terms under which his right arises: *Forbes v. Connolly* (1856) 5 Gr. 657; see further as to contracts to purchase by a lessee: *Young v. Brown* (1858) 6 Gr. 402; *Casey v. Hanlon* (1874) 22 Gr. 445.

In *Forbes v. Connolly* (*supra*) the plaintiff, the lessee, sued for specific performance. The lease gave the right to purchase upon payment of a certain sum, and upon the lessee having paid all the rents and observed all the covenants provided for in the lease. The rent was in arrears and the lessor wrote the plaintiff that he considered the lease void. It was held that the payment of rent was a condition precedent and the plaintiff must fail.

*Ball v. Canada Company* (1877) 24 Gr. 281, is to the same effect. The same doctrine was applied in *Coventry v. McLean* (1894) 21 A. R. 176 [C.A.]. There a lease gave an option to purchase at any time "during the continuance of the term hereby demised." The lessor re-entered and put an end to the term for non-payment of rent [see p. 755, *ante*]. The Court refused to relieve from the forfeiture, which was the result of negligence, in order to permit the lessee to exercise the option where,

as here, the lessor had reasonable grounds—the lessee's misrepresentations on procuring the lease—for resisting specific performance: *Green v. Low* [p. 999, *post*] was held to be clearly distinguishable.

These cases followed *Weston v. Collins* (1865) 34 L. J. (Ch.) 353; 11 Jur. N. S. 190. There the option was to be exercised upon giving six months' notice in writing and paying the purchase price, *after* receipt of which—as the contract was construed by the Court—the lessor was to prepare an abstract of title and furnish evidence in support thereof at the lessee's expense. The lessee contended that he was not bound to pay the purchase money until after the title had been investigated. Lord Westbury, L.C., said: "The covenant by the defendant (lessor) upon which this suit is founded, is so worded as to impose on the lessee or his assigns the obligation of doing certain things as precedent conditions to any obligation on the part of the lessor. If the lessee chooses to comply with the conditions the lessor is bound. It is in fact a conditional offer by the lessor, and the condition must be performed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind the rules which are applicable to ordinary contracts for the sale of real estate. . . . If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it shall be first done on the one side before any obligation arises on the other. The things required must be done in the order of sequence which is stipulated."

The dictum of Blake, V.C., in *Ball v. Canada Co.* [*ante*, p. 997], that the performance of conditions precedent is excused when such performance becomes impossible through no default of the person having the option, seems "to be scarcely reconcilable with the cases": (1896) 16 C. L. T. 223.

But a lessee need not have performed stipulations in the lease not made conditions precedent: *Hunt v. Spencer* (1867) 13 Gr. 225.

The lease may be so expressed that the option will be independent of the continuation of the term, and in such

a case the lessee's right to purchase will be unaffected by the forfeiture of the term: *Green v. Low* (1856) 22 Beav. 625.

In *Hunt v. Spencer* (*supra*) H. leased oil lands from S., and covenanted to sink a test well on the premises to a certain depth. He was to have the right to purchase a described five acres *at any time* during the continuance of the term, and the whole premises at the end of the term. The well was commenced but owing to unforeseen circumstances beyond H.'s control, it was not completed to the required depth. It was held that in so far as the five acres were concerned specific performance should be granted;—they could have been purchased immediately after the lease was executed, but as to the residue H.'s action failed.

And see *Starkey v. Barton* [1909] 1 Ch. 284.

### *Rights of Assignees.*

In *Woodall v. Clifton* [*ante*, p. 996] the Court of Appeal decided that the covenant giving an option to purchase was not one running with the land [see p. 1086, *post*], and, by virtue of 32 Hen. VIII., with the reversion, so as to enable the assignee of the lessor to be sued.

But it seems that if the option does not infringe the Rule against Perpetuities, discussed at p. 996, *ante*, this is not so. This subject is discussed in an Article in (1911) 31 C. L. T. p. 367, at pp. 370, 371. And see *Youill v. White* (1902) 5 Terr. L. R. 275; 22 Occ. N. 312.

An equitable assignee of the term was not allowed to exercise an option given to the lessee and his assigns as the term was not vested in the assignee: *Friary Holroyd and Healey's Breweries, Ltd. v. Singleton* [1899] 1 Ch. 86. This case was reversed on the facts: see [1899] 2 Ch. 261 [C.A.].

Where a lessee and his executors, administrators, and assigns have an option to purchase the fee, this option is attached to the lease and passes with it and is a part of the lessee's personal estate, and if the heir at law, who is also administrator, exercises the option, he cannot

make a good title on re-sale without the concurrence of the next-of-kin who are interested in the personal estate: *In re Adams* (1884) 24 Ch. D. 199; see, however, *Henrihan v. Gallagher* (1862) 9 Gr. (1862) 488; 2 E. & A. 338.

A. purchased a lease from B. and the latter covenanted with A. to purchase at the end of three years for a greater price than he paid, and after the three years had expired A. tendered an assignment of the lease which B. refused; it was held in an action on the covenant that A. was entitled to recover as the amount of damages the price agreed on by B. for the re-purchase: *Gibson v. Cubitt* (1837) 5 O. S. 711.

And see *Cornish v. Boles*, noted at p. 1063, as to the right to assign.

### *The Effect of Exercising the Option.*

When the option is duly exercised a contract for sale and purchase is completed and the usual consequences follow.

Thus the land is treated in equity as converted into money which becomes part of the vendor's personal estate: *Fletcher v. Ashburner* (1779) 1 Bro. Ch. 497; 1 Wh. & T., 8th edn., 347; and if the lessor dies and the option is subsequently exercised, the conversion operates as of the date the option was created: *Lawes v. Bennett* (1785) 1 Cox Eq. Cas. 167. But see the criticism of this case in 1 White & T., 8th ed., 373 *et seq.*; (1911) 31 C.L.T. 367 *et seq.*, and see *Woodall v. Clifton* [1905] 2 Ch. 257 [C.A.]; *Worthing Corporation v. Heather* [1906] 2 Ch. 532.

In *In re Blake, Cawthorne v. Blake* [1917] 1 Ch. 18; 37 C. L. T. 140 [Eve, J.], *Lawes v. Bennett* (*supra*) was followed, and it was also held that neither the fact that the exercise of the option was not followed by completion of the purchase, the lessee having meanwhile died insolvent, nor the fact that the trustees of the will of the vendor, he having also died, had exercised a right of re-entry which they had before actual completion under the building agreement undid the conversion and worked a reconversion into realty.

And see *Gardner v. Holmes* [1918] 1 W. W. R. 456; 24 B. C. R. 416; 38 D. L. R. 156 [B.C.—C.A.].

Where a lease providing for rent payable yearly in advance contained an agreement that the lessee might purchase at any time for \$600, and that any payment which might be made on account of the rent in advance at the time when the conveyance was made should be allowed as part payment, it was held that in case of a purchase all the advance rent should go on account of the purchase money: *Freeman v. Stewart* (1904) 36 N. B. R. 465, affirming (1902) 2 N. B. Eq. Reps. 365, 461.

Pending completion of the agreement the relationship of landlord and tenant is suspended and the lessor can not subsequently terminate the purchaser's (lessee's) rights for breach of covenant: *Raffety v. Schofield* [1897] 1 Ch. 937.

### *Enforcement.*

The option will, in proper cases, be enforced by a decree for specific performance.

A lease made by a company contained a proviso that if the lessor obtained during the term an offer to purchase the premises, before accepting the same the lessee should be given the option of purchasing on the same terms as in the offer. During the term the company was ordered to be wound up. It was held that the rights of the lessee were not affected by the order: that the liquidator could only sell subject to the terms of the lease, and not having given the tenant the opportunity of purchasing, the company was liable in damages, although the tenant was well aware that the liquidator was endeavouring to sell the premises: *McCarter v. The York County Loan Co.* (1907) 14 O. L. R. 420; 10 O. W. R. 165 [Mabee, J.].

An informal memorandum leasing a house for three years and adding, "we hereby agree to give to W. M. B. an option to purchase said property for \$7,300," and signed by the vendors, was held sufficient to satisfy the Statute of Frauds, although no time was set for the exercise of the option, and the vendors' names did not appear in the body of the writing: *Bennett v. Stodgell* (1915) 36 O. L. R. 45 [App. Div.].

An option to purchase for \$7,300 cash, or \$7,500 half cash, balance on suitable mortgage, was held not to be too indefinite to enforce when the purchaser made it certain by electing to pay in cash: *Bennett v. Stodgell*.

Where specific performance cannot be granted, as where the rights of *bona fide* purchasers for value have intervened, damages may be recovered from the vendors for breach of the covenant, but not from such innocent purchasers: *Bennett v. Stodgell* (1915) 36 O. L. R. 45 [App. Div.].

This case disapproved of *McIntyre v. Stockdale* (1912) 27 O. L. R. 460 [Clute, J.], and followed *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146.

“Ordinarily, where the vendor is unable to convey the whole of the land which he has contracted to sell, the purchaser has two courses open to him: either to refuse to complete the purchase, in which case he may sue for damages; or to require the vendor to convey that to which he can make title, and to submit to a proportionate reduction or abatement of the purchase money in respect of the remainder of the land”: per Meredith, C.J.O., in *Ontario Asphalt Block Co. v. Montreuil* (1913) 29 O. L. R. 534 [App. Div.], at p. 545.

See also *McCune v. Good* (1915) 36 O. L. R. 51 [App. Div.].

The Rule in *Bain v. Fothergill* (1874) L. R. 7 H. L. 158; 46 L. J. Ex. 243, approving *Flureau v. Thornhill* (1776) 2 W. Bl. 1078 is, that if a vendor of land without fraud is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain.

But this rule is an “anomalous” one, “based upon and justified by difficulties in shewing a good title to real property in this country, but one which ought not to be extended in cases to which the reasons on which it is based do not apply”: per Lindley, M.R., in *Day v. Singleton* [1899] 2 Ch. 320.

In Saskatchewan the rule has been departed from where the land was under the Land Titles Act, and sub-

stantial damages have been given: *Bannerman v. Green* (1908) 1 Sask. L. R. 394, at p. 401; *O'Neill v. Drinkle* (1908) 1 Sask. L. R. 402, at p. 409; 8 W. L. R. 937 [Lamont, J.], followed in *Peacock v. Wilkinson* (1913) 26 W. L. R. 396; 15 D. L. R. 216; 8 W. W. R. 937 [Sask.—Johnstone, J.].

In *McAndie v. Jackson* (1911) 1 W. W. R. 10 [Alta.], Scott, J., refused to follow *O'Neill v. Drinkle* (*supra*), and followed *Bain v. Fothergill* (*supra*), and see *Maitland v. Matthews* (1915) 31 W. L. R. 163; *McEachern v. Corey* (1916) 34 W. L. R. 1196 [Alta.—Harvey, C.J.]; *Ross v. Stovall* [1919] 1 W. W. R. 673; 45 D. L. R. 397 [Alta.].

In *Meighen v. Couch* (1913) 23 M. R. 117; 23 W. L. R. 523; 9 D. L. R. 829; *Bain v. Fothergill* (*supra*), was followed, and see *Lobell v. Williams* (1915) 30 W. L. R. 352.

M. in 1903 leased two parcels of land to the plaintiff for ten years. The plaintiff was to make certain improvements, and the lease contained an option to purchase both parcels, the lessor covenanting to convey an estate in fee simple. In 1908 both parties became aware that M. had only a life estate in parcel 1, and his Crown grant of parcel 2 [a water lot] had been obtained by representing that he had a title in fee simple to parcel 1. The plaintiff duly exercised its option and when M. refused to convey elected to take specific performance with an abatement. It was held that it was not entitled to more than that: neither fraud nor misrepresentation was alleged—and damages for loss of the bargain were refused: *Ontario Asphalt Block Co. v. Montreuil* (1913) 29 O. L. R. 534; (1914) 32 O. L. R. 243 [App. Div.]. This judgment was affirmed — Fitzpatrick, C.J., and Davies, J., dissenting—(1915) 52 S. C. R. 541; 36 C. L. T. 647. The majority of the court held that the rule in *Bain v. Fothergill* (*supra*) was applicable: the minority that it should not be applied in such a case where the lease contained onerous conditions binding on the lessee to expend large sums in improving the property.

In 1919, on the death of the tenant for life, the remaindermen brought an action for possession. The

defendant counterclaimed for lasting improvement made on the lands under mistake in title. Considerable sums had been expended on the lands by the lessees before they knew their lessor was only tenant for life, and a further considerable expenditure for improvements was made afterwards. It was held, reversing the judgment of Falconbridge, C.J.K.B. (1919) 46 O. L. R. 136, that the defendant had not made the first expenditures under the belief that the land was his own, and that s. 37 of the Conveyancing and Law of Property Act, R. S. O. 1914, c. 109, was not applicable. But as a condition of granting the relief asked by the plaintiffs they were ordered to pay for the lasting improvements made before the lessees knew their father was tenant for life only; the compensation to be to the extent to which the value of the lands had been enhanced by the improvements: *Montreuil v. Ontario Asphalt Block Co.* (1920) 47 O. L. R. 227 [App. Div.].

### *The Measure of Damages.*

The measure of damages for the breach of such a covenant is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made: *Bennett v. Stodgell* [*ante*, p. 1001].



## CHAPTER XVI.

### ASSIGNMENT AND DEVOLUTION.

ARTICLE 136.—*By Operation of Law.*

Death of lessor.

Death of lessee.

Legal process.

Bankruptcy.

ARTICLE 137.—*Assignment of the Reversion.*

Purchase of land subject to lease.

The relation of the purchaser to the tenant.

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ARTICLE 138.—*Assignment of the Term.*

Mortgages of leases.

The liability of the assignor to the lessor.

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ARTICLE 139.—*Covenant not to Assign without Leave.*

Not broken by certain acts.

Acts which are a breach.

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ARTICLE 140.—*Withholding Leave Unreasonably.*

ARTICLE 141.—*Requisites of a Valid Assignment.*

Writing required.

Deed required in certain cases.

ARTICLE 142.—*Covenants Running with the Land.*

ARTICLE 143.—*Covenants Running with the Reversion.*

### ASSIGNMENT BY OPERATION OF LAW.

ARTICLE 136.—The interest of the lessor or lessee of lands or tenements may be transferred to another

person or persons by operation of law, independently of the act of the parties, by reason of: (1) Death, (2) legal process and (3) bankruptcy.

### *I. Death.*

#### *(a) Death of the Lessor.*

On the death of the lessor, his reversionary interest, at common law—unless he had parted with it during his lifetime—vested in his heir if he died intestate, and, in case he left a will devolved according to the terms thereof, and—herein differing from an assignment *inter vivos*—attornment by the tenant was not necessary (Shep. Touch. 256; *Doe d. Wright v. Smith* (1838) 8 Ad. & El. 255). If the reversionary interest was itself a leasehold it vested in the personal representative.

Now, by the Devolution of Estates Act, R. S. O. 1914, c. 119, s. 3, real property in Ontario is assimilated to personalty, and both, notwithstanding any testamentary disposition, become vested in the executor or administrator, who holds same as trustee for the persons by law beneficially entitled thereto. The Devolution of Estates Act, Manitoba, R. S. M. c. 54, s. 21, applying to estates of persons dying on or after the 1st July, 1885, is to the same effect. The Devolution of Estates Act, Saskatchewan, R. S. S. 1909, c. 43, s. 21, provides that land in that province shall descend to the personal representatives of the deceased owner thereof and be distributed as if it were personal estate. As regards Alberta a similar provision is contained in (1906) 6 Edw. VII, Alberta c. 19, s. 2.

For Nova Scotia see R. S. N. S. 1900, c. 140, ss. 2-5; British Columbia, R. S. B. C. 1911, c. 4, s. 108; New Brunswick, C. S. N. B. 1903, c. 161, ss. 1, 2.

#### *(b) Death of the Lessee.*

On the death of a lessee, his interest, whether for a term or from year to year, vests in his personal repre-

sentatives (1 Wms. Exors., 10th ed. 512), the executors, if there be a will, taking from the date of the death, though in case of intestacy, the title of the administrators does not arise until grant of letters of administration, upon the issue of which such title will relate back to and vest as of the date of the death of the intestate: (*Foster v. Bates* (1843) 12 M. & W. 226; *Thorpe v. Stallwood* (1843) 12 L. J. N. S. (C. P.) 241; *Re Elizabeth Price* [1904] P. 301). The vesting in the personal representative is a conclusion of law (*Ackland v. Pring* (1841) 2 Man. & G. 937) and as such will not cause a forfeiture under a clause forbidding assignment of the lease. "It is an alienation by the act of God," per Hardwicke, C., in *Sears v. Hind* (1791) 1 Ves. 294.

Inasmuch as an executor or administrator must renounce *in toto* or not at all, he cannot waive a term of years (*Rubery v. Stevens* (1832) 4 B. & Ad. 241), even though the terms of same are onerous and the rent reserved be in excess of the value of the land. In the latter case he will, *quâ* executor, be liable to the extent of the estate's assets for as much of the rent as the value of the land amounts to (Pollexfen, 132). Furthermore, the whole term vests in the personal representative of the deceased lessee, without entry or formal taking of possession by him—he being an assignee in law of the term (5 Co. Rep. 17b; *Wollaston v. Hakewill* (1841) 3 M. & Gr. 297, at p. 321).

The executor is the proper person to sue "for all covenants; and indeed all contracts with the testator broken in his lifetime; and the reason appears to be that they are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee," per Abinger, C.B., in *Raymond v. Fitch* (1835) 2 C. M. & R. 588, at p. 597, where an executor was held entitled to sue the lessee of his testator for breach of a covenant not to fell timber trees excepted out of the demise, the breach having been committed in the lifetime of the testator. See also *Ricketts v. Lloyd*

(1844) 12 M. & W. 718. In the latter case all the authorities were reviewed, and the result is that unless it be a covenant in which the heir alone can sue for a breach of the covenant in the lifetime of the testator, *i.e.*, a covenant running with the land, the executor can sue, unless it be a mere personal contract, in which the rule applies that *actio personalis moritur cum persona*—per Parke, B., *ubi.*, *sup.* p. 723. See, also, *Kingdon v. Nottle* (1813) 1 M. & Sel. 355; *King v. Jones* (1814) 5 Taunt. 418; *Ricketts v. Lloyd* (1844) 12 M. & W. 718. The executor or administrator is upon the same principle liable upon all similar covenants which the deceased landlord may have broken in his lifetime.

The title vests in the executor, despite the fact that the leasehold has been bequeathed, and his assent is required before the term will vest in the legatee, but upon such assent, either express or implied, the title becomes vested in the legatee, who is then in the position of an assignee and takes it *cum onore*: *Hawkins v. Hawkins* (1880) 13 Ch. D. 470. As to the executor's consent see 2 Wms. Exors., 10th ed., 1101; *Redman, Landlord and Tenant*, 6th ed. 662.

The personal representative of the lessee is entitled to recover damages in respect of breaches of all covenants with the lessee sustained during the latter's lifetime (*Lucy v. Levington* (1683) 1 Vent. 175; *Derisley v. Constance* (1790) 4 T. R. 75; *Raymond v. Fitch* (1835) 2 C. M. & R. 588.

This latter case does not appear to be an authority on the point in connection with which it is cited in Mr. Bell's *Landlord and Tenant*—indeed, it appears to decide the reverse.

On the other hand he is liable in his representative capacity to the extent of the assets for all breaches of covenants committed by the deceased himself, and also for those which occur in his own time, and the judgment will be *de bonis testatoris*. If the executor or administrator has entered upon the demised premises, he will, in addition, render himself personally liable as assignee and

the judgment will be *de bonis propriis*: *Tilney v. Norris* (1700) 1 Ld. Ray. 553; S. C. Carth. 519; Salk. 309).

At one time it was asserted that an executor by merely proving the will became assignee of the term and thus rendered himself personally liable on the covenants, though he never occupied or became possessed in fact of the premises. In *Rendall v. Andreae* (1892) 61 L. J. (Q. B.) 630, the point was raised, and Smith, J., after an elaborate review of the authorities, held that before entry and taking possession the executor of a lessee cannot be made liable as assignee of the term, but, if he does enter and take possession, he may be made liable personally; yet he may then, by proper pleading, limit his liability for rent to the yearly value the premises might have yielded, though it would seem he cannot so limit his liability in respect of breach of contract to repair (p. 633). Furthermore, in case of entry, the lessor can elect whether to sue the representative in his personal or representative character (*Halsbury v.* 14, p. 307).

As to the personal representative's liability for rent accrued and accruing due in respect of the leased premises, see *ante* p. 323.

The rule of law, as it applies to a personal representative with respect to non-payment of rent and taxes, limiting his liability, does not extend to other covenants, such as one to repair. "It would be a strange thing to say, for instance, that an executor or administrator shall not be bound to repair in the first year of a term, because they have derived no profit from the premises; in effect, that would be saying that the lessor shall have no rent till his end of the term, for if the executor is not bound to repair in the first year because he has no profits, the same answer might be made in the second, and the premises might go on in a course of deterioration till the end of the term, when, if the executor were without assets, the lessor might be deprived of any redress. But there is no case to show that when an executor is sued as assignee, he is not liable for repairs as any other

assignee," per Tindal, C.J., in *Treemeare v. Morrison* (1834) 1 Bing. N. C. 89, at 97; *Sleep v. Newman* (1862) 12 C. B. N. S. 116.

In *Sleep v. Newman* (*supra*), which was an action against an executor personally, who had entered, for breach of a covenant to repair, a plea that the demised premises had yielded no profit beyond what he had paid over to the lessor, that the premises had come to him only as executor and that he had offered to surrender them to the landlord before the breaches had been committed, was held bad.

The result of the above decisions was to place the personal representatives, in many cases, in a difficult position, and in order to afford a remedy a clause (s. 27) was inserted in the Real Property Limitation Act 1859, 22 & 23 Vict. c. 35 (Lord St. Leonard's Act) to the effect that where an executor or administrator liable as such to the covenants in any lease or agreement for a lease, granted or assigned to the testator or intestate has satisfied all such liabilities as may have accrued due or been claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim in respect of any fixed sum which the lessee may have agreed to lay out on the premises, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate amongst the parties entitled and shall not after having so assigned be personally liable in respect of any subsequent claim under such lease or agreement: s. 28 of the same Act makes a similar provision with regard to rent charges.

These sections have been re-enacted in Ontario by the Trustee Act, R. S. O. 1914, c. 121, ss. 54 and 55; New Brunswick, C. S. N. B. 1903, c. 163, ss. 12 and 13; British Columbia, R. S. B. C. 1911, c. 4, s. 82; Saskatchewan, R. S. S. 1909, ss. 47 and 48; Alberta, Cons. Ord. 1915, c. 119, s. 47.

An executor who has assented unconditionally to a specific bequest of the testator's leasehold estates is not

entitled to an indemnity out of the general estate in respect of his covenants contained in the lease (*Shadbolt v. Woodfall* (1845) 2 Coll. 30), and Lord St. Leonard's Act has not altered the law in this respect, since it only affects purchases. It follows that an executor may so deal with the leasehold as to lose the protection of the Act, *e.g.*, he may assign the leasehold to the legatee (whether specific or residuary) or to trustees for the legatee, and as the latter is not a purchaser within the meaning of the Act the executor loses his right to an indemnity (*Smith v. Smith* (1862) 1 D. & S. 384).

The word "purchaser" in the Act means a person who buys the lease and pays a price in money for it. Therefore, where part of an estate consisted of an onerous lease at a heavy rental, for which no purchaser could be found and the executors assigned the lease to assignees, who in consideration of receiving a monetary payment were prepared to take it over and indemnify the executors, it was held that the assignees were not purchasers (*In re Lawley, Jackson v. Leighton* [1911] 2 Ch. 530).

Where the estate is distributed under the direction of the Court, there is never any necessity for retaining assets in order to protect the executors, they being fully indemnified by the direction of the Court; the only remedy of a creditor on covenant or otherwise being against the legatee (*Re Sanford, Bennett v. Lytton* (1860) 2 J. & H. 155).

## II. Legal Process.

If a party to a lease has a judgment recovered against him, his interest in the term can be taken in execution through the medium of a writ of *fiat facias*, under which the judgment debtor's interest therein is sold by the sheriff: *Halsbury, v. 14, p. 41; Doe d. Court v. Tupper* (1837) 5 O. S. 64.

When a *fi. fa.* is lodged in the sheriff's hands, it binds a leasehold estate from that time, except in the case of the Crown; and if the debtor subsequently to this makes an assignment of it, the judgment creditor may, notwith-

standing, proceed to sell the term and his vendee will be entitled to the possession, notwithstanding such assignment: *Burden v. Kennedy* (1757) 3 Atk. 739. In case, however, he does not sell the term, but returns the writ, the assignment takes precedence of a second writ: *Williams v. Craddock* (1831) 4 Sim. 313. The sheriff has no power to eject the judgment debtor from the premises: *R. v. Deane* (1680) 2 Show. 85. A seizure does not vest the term in the sheriff, but it remains in the debtor until the sheriff actually executes an assignment to a purchaser. The sheriff has no right to possession of the land: *Coleman v. Rawlinson* (1858) 1 F. & F. 330, and trespass may be maintained against him if he takes possession: *Playfair v. Musgrove* (1845) 14 M. & W. 239; *Cochlin v. Massey-Harris Co.* (1915) 8 W. W. R. 286 [Alta.—App. Div.].

Nothing passes by the mere sale of a term of years under an execution. There must be an assignment by the sheriff, which is usually executed under his seal of office. Nothing less than this can support an ejectment by the purchaser, and, except under certain circumstances, he has also to prove a judgment on which the execution issued: *Duggan v. Kitson* (1861) 20 U. C. R. 316, 320, per Robinson, C.J.

When the sheriff sells a term he must make an assignment by deed. Merely putting the execution creditor in possession will not pass the term and the debtor may recover in ejectment: *Doe d. Hughes v. Jones* (1842) 9 M. & W. 372.

A lessor may become the purchaser of the interest of the lessee at sheriff's sale, when the same is seized and sold by a third person. In such case, the term will merge in the fee, and the lessor will be entitled to the possession: *Stroud v. Kane* (1856) 13 U. C. R. 459.

When the sheriff sells a term under execution he does not usually put the purchaser into actual possession, especially if there be an under-tenant: *Taylor v. Cole* (1789) 3 T. R. 292; but the purchaser acquires a right of entry and is left to obtain actual possession by ejectment



or to recover the rent from the under-tenant by distress or action in the usual manner: Bac. Abr. tit. "Execution," C. p. 388; Col. Ejec. 569; *Lloyd v. Davies* (1848) 2 Exch. 103; *Poole v. Whitt* (1846) 15 M. & W. 571; after the term vests in him the purchaser becomes liable to the rent and covenants in the lease in the same manner as any other assignee of the term: *Holford v. Hatch* (1779) 1 Doug. 183; and the lessee continues liable on his covenants in the same manner as he would have done had he executed an assignment of the term to a purchaser thereof: *Auriol v. Mills* (1790) 4 T. R. 94-8.

The sheriff, under a *fi. fa.* may sell what the termor continues to hold under the lease, but he cannot sell part of his interest or a part of the premises: *Osborne v. Kerr* (1858) 17 U. C. R. 134; see also *Goold v. Rich* (1872) 4 Ch. Cham. 87.

A term of years in land cannot be sold under an execution from the Division Court, and when the landlord purchased his tenant's term, put up to sale by the bailiff of a Division Court under execution, and then brought ejectment on the ground that there was a merger and he was entitled to immediate possession, a non-suit was entered: *Duggan v. Kitson* (1861) 20 U. C. R. 316.

R. on the 13th October, 1852, granted certain land to one S. to hold "to the said S. and the heirs of his body" for twenty-one years or the term of his natural life from the 1st of April, 1853, fully to be complete and ended, "but not to underlet to any person except to the family of the said S. for any period during the said term." A yearly rent was reserved which S. covenanted to pay, and it was provided that on failure to perform the covenant the lease and the term thereby granted "should cease and be utterly null and void." It was held that by this instrument S. took a life estate in which the term merged, and S. therefore had no interest which could be sold under a *fi. fa.* goods: *Dalye v. Robertson* (1860) 19 U. C. R. 411.

A rent charge issuing out of and chargeable upon a freehold estate, and granted to a person for his life, is

not subject to be seized and sold as a chattel under a writ of *fi. fa.* goods: *Smith v. Turnbull* (1849) 5 U. C. R. 586.

A term cannot be sold under a *fi. fa.* if it has passed from the debtor and lessee before the seizure.

The defendant leased to his father certain lands for life to work and to enjoy the same; but that, should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him; and in the event of the father becoming incapable of manual labour, he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm; subsequently thereto, the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. It was held that the defendant had the right to possession under the terms of the lease, and the plaintiff must fail: *Turley v. Benedict* (1881) 7 A. R. 300.

Since the Judicature Act a person seeking equitable execution need not sue out an elegit: *Ex parte Evans* (1879) 13 Ch. D. 252 C. A. The writ and inquisition thereon, when returned and filed, operate only as an assignment of the reversion; and therefore the judgment creditor cannot maintain ejectment against the tenants in possession until after their respective terms have expired or been duly determined by notice to quit or otherwise: *Doe d. Costa v. Wharton* (1798) 8 T. R. 2. But he may, like any other assignee of the reversion, sue or distrain for the rent which becomes due after the filing of the writ and the return thereto, and that without any previous attornment by the tenant: *Lloyd v. Davies* (1848) 2 Exch. 103; *Ramsbottom v. Buckhurst* (1814) 2 M. & S. 565; provided the writ and inquisition be valid, but not otherwise: *Arnold v. Ridge* (1853) 13 C. B. 745; he is not entitled to any rent which became due before the inquisition, although after the delivery of the writ

to the sheriff: *Sharp v. Key* (1841) 8 M. & W. 379; 9 Dowl. 770. If the tenancy commenced after the judgment was entered up and duly registered, an ejectment may be maintained against such tenant without previous notice to quit: *Doe d. Putland v. Hilder* (1819) 2 B. & Ald. 782; *Doe d. Evans v. Owen* (1831) 2 C. & J. 71; so if the debtor himself is in actual possession: *Doe d. Parr v. Roe* (1841) 1 Q. B. 700; *Doe d. Roberts v. Parry* (1844) 13 M. & W. 356; 2 D. & L. 430.

### III. Bankruptcy.

Under the Bankruptcy Act (Can.) 9 Geo. V. c. 36, if a lessee is adjudged a bankrupt and a receiving order be made against him, the unexpired portion of his term forthwith passes to and vests in the trustee named in the receiving order, and in case of a change of trustee, passes from trustee to trustee and vests in the trustee for the time being during his continuance in office without any conveyance, assignment or transfer (s. 6, ss. 3).

By s. 9 it is provided that any insolvent debtor whose liabilities to creditors provable as debts under the Act exceed five hundred dollars may at any time prior to the making of a receiving order against him make to an authorized trustee an assignment of all his property for the general benefit of his creditors. Such assignment is termed an authorized assignment, and any other assignment made by an insolvent debtor for the general benefit of his creditors is void.

By s. 10 an authorized assignment, subject to the rights of secured creditors, vests in the trustee all the property of the assignor at the time of the assignment other than trust property and such as is exempt from execution or seizure under legal process.

Under the English Bankruptcy Acts it has been held that if the lease contains a specific proviso determining the term in case the lessee shall become bankrupt or make an assignment for the benefit of his creditors, such proviso is valid, and upon the happening of such event, the lease is forfeited, and the trustee in bankruptcy acquires

no interest therein: *Roe d. Hunter v. Galliers* (1787) 2 T. R. 133; *Doe d. Mitchinson v. Carter* (1798) 8 T. R. 57 and 300; *Doe d. Lockwood v. Clarke* (1807) 8 East. 185; *Ex p. Gould, In re Walker* (1884) 13 Q. B. D. 454.

A lease was granted to A., his executors, administrators and assigns, provided that if A, his executors, administrators or assigns should become bankrupt or insolvent the estate should determine and the lessor have power to re-enter. A. died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt, it was held that the lease was forfeited (*Doe d. Bridgman v. David* (1834) 1 Cr. M. & R. 405).

The liquidation of a limited company is a bankruptcy within the meaning of a condition for forfeiture on the bankruptcy of the lessee: *Fryer v. Ewart* [1902] A. C. 187.

Where, however, the lease only contains the usual covenant against alienation without leave, and no proviso that it shall be void in case of the insolvency or bankruptcy of the lessee, no forfeiture will accrue, and the trustee in bankruptcy will be entitled to the unexpired residue of the term: *Doe d. Mitchinson v. Carter, supra*; *Re Johnson, Ex parte Blackett* (1894) 70 L. T. N. S. 381.

A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee executed a deed conveying all his property to trustees for the benefit of his creditors. Subsequently, he was declared bankrupt. Held, that the deed was avoided by the bankruptcy and became a nullity *ab initio*, that no assignment (the event on which the forfeiture was to arise) had in effect happened, and, therefore, that there was no forfeiture: *Doe d. Lloyd v. Powell* (1826) 5 B. & C. 307.

Where the alienation has been caused by the voluntary act of the tenant, even though it amounts to an assignment by operation of law, the Courts have leaned towards construing it as effecting a forfeiture.

A tenant for life was prohibited from assigning or parting with his life interest in a settled fund on penalty of forfeiting his estate. He presented a petition for liquidation under the Bankruptcy Act, 1869 [Imp.], such being an act of bankruptcy, but there was no adjudication and the presentation of the petition was followed by a liquidation by agreement. Held, that this operated as a forfeiture: *In re Amherst's Trusts* (1872) 13 Eq. 464; *Holland v. Cole* (1862) 31 L. J. Ex. 481. See *In re Cotgrave*, *Minors v. Cotgrave* [1903] 2 Ch. 705; *Cohen v. Popular Restaurants* [1917] 1 K. B. 480. Compare *In re Riggs*, *Ex p. Lovell* [1901] 2 K. B. 16, where the lessee's petition was followed by an adjudication in bankruptcy, and Wright, J., held that such adjudication was not a voluntary assignment and therefore there was no forfeiture.

A covenant in a lease against assigning the demised premises, in the absence of any context giving the covenant an extended meaning, covers only a legal assignment. Such a covenant is not broken by the lessee executing a declaration that he would stand possessed of the demised premises upon trust for a trustee for the benefit of his creditors. "An equitable assignment is not sufficient to operate as a breach of the covenant. There must be an assignment at law," per A. L. Smith, L.J., in *Gentle v. Faulkner* [1900] 2 Q. B. 267, at p. 274.

The Bankruptcy Act (Can.) also provides (s. 52, ss. 5) that notwithstanding any stipulation in any lease or agreement, where a receiving order or authorized assignment has been made, the trustee may within one month from the date of same, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the bankrupt or assignor at the time of the receiving order or assignment for the unexpired term of any lease under which such premises were held or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement, or he may disclaim the lease or agreement. Should the trustee not give such

notice within the time, he is to be deemed to have disclaimed same.

By s.s. 6 a trustee electing to retain the premises for the unexpired term thereof has power to assign or sub-let for such period.

By s.-s. 7 it is provided that the entry into possession of the premises by the trustee during the above period of one month shall not be deemed to be evidence of an intention on the part of such trustee to elect to retain the premises, nor affect his right to disclaim.

Under the English Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) it has been held that, under ordinary circumstances, a trustee in bankruptcy, instead of disclaiming, may, in order to escape from liability for the rent, and on the covenants, assign the lease to a pauper, knowing him to be such: *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92.

The provisions of the English Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 55), relative to disclaimer differ in important particulars from those contained in the Dominion Bankruptcy Act. Consequently, the English cases will afford little assistance in construing the latter Act. See Baldwin's Law of Bankruptcy, 10th ed., pp. 305-315.

The liability of a guarantor of rent is determined by a disclaimer of a lease in bankruptcy: *Stacey v. Hill* [1901] 1 K. B. 660.

Both the executors and trustees in bankruptcy are personally liable on the repairing covenants in leases in the event of the assets of the testator or bankrupt proving insufficient: *Tremeere v. Morison* (1834) 1 Bing. N. C. 89; *Titterton v. Cooper* (1882) 9 Q. B. D. 473.

## ASSIGNMENT OF THE REVERSION.

ARTICLE 137.—Any one who has a reversion of lands may dispose of the same, and no attornment by the tenant is necessary.

A purchaser under agreement for sale who has leased the land can assign his interest in the lease only

subject to the rights of the vendor: *Canadian Pacific Railway Co. v. Fuller* [1917] 3 W. W. R. 90; 36 D. L. R. 404 [Alta.—App. Div.].

“*The Purchase of Land under Lease.*”

This is the title of a leading Article, thought to be written by E. D. Armour, K.C., then Editor, in (1898) 18 C. L. T., pp. 1 *et seq.*, which forms the basis of the following discussion.

A person purchasing a “reversion” or a “reversionary interest,” simply, knows that he is not getting a present interest and the difficulties as between him and his tenant which arise when he thinks he is purchasing a fee simple in possession do not arise.

In the latter case, the matter presents itself for consideration in two aspects which are found in decided cases: (1) The relation of the purchaser to the tenant, and (2) The relation of the purchaser to the vendor.

It is with the first aspect, which only arises after the conveyance of the estate, that this Article deals.

*The Relation of the Purchaser to the Tenant.*

In 1794 Lord Loughborough laid down the principle that if the purchaser buys with notice, he is charged with all the obligations to the tenant, binding the land, by which the vendor was bound. And this is so even where the purchaser understood the obligations were different to what they turned out to be. *Taylor v. Stibbert* (1794) 2 Ves. Jr. 437.

The purchaser is put upon inquiry when a lease is stated: it is his business to look at it and to see whether there is any covenant that may materially influence his judgment as to the value: *Hall v. Smith* (1807) 14 Ves. 433; *Daniels v. Davison* (1809) 16 Ves. 249; *Bailey v. Richardson* (1852) 9 Hare, 734.

In *Bailey v. Richardson* it was said: “The principle of *Daniels v. Davison* is that a purchaser, having notice that another is in possession, is not justified in assuming the possession of that person to be the possession of the

vendor, but is bound to make inquiry of the person in possession.”

But in *Myles v. Langley* (1829) 1 R. & My. 39, the Court refused to extend the doctrine of *Daniels v. Davison* to the extent of requiring the purchaser to pursue inquiries as to the nature of the interest of a person who has lately been in occupation.

The purchaser is not bound by an agreement between the vendor and tenant which is merely a personal agreement collateral to the lease: *Phillips v. Miller* (1875) L. R. 9 C. P. 196; 10 C. P. 420.

The possession of the tenant is notice that he has some interest in the land, and a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is or to give effect to it whatever it may be: *Barnhart v. Greenshields* (1853) 9 Moo. P. C. 18.

In *Thistlethwaite v. Sharp* (1912) 20 W. L. R. 474; 1 W. W. R. 946 [Sask.—Maclean, D.C.J.], it was held that possession of land by the vendor's tenant is constructive notice to the purchaser of the terms and conditions of the lease. The purchaser, knowing of the tenancy, is bound by all the conditions agreed to between the vendor and the tenant: *Hunt v. Luck* (*infra*) and *Hobson v. Gorringe* [1897] 1 Ch. 182, specially referred to. The plaintiff, being tenant of a lot with a house on it, put up a “lean-to,” with the landlady's permission. The latter sold the house and lot to the defendant, who had notice of the tenancy and of an agreement between the plaintiff and the vendor that the plaintiff was to be at liberty to remove the “lean-to” when he vacated the premises. The plaintiff, leaving the premises, detached the “lean-to,” but left it on the lot, and the defendant refused to allow it to be removed. Held, that the plaintiff was entitled to possession of the “lean-to” or to recover the value of it, and also damages for detention and illegal possession; and the defendant was entitled, upon his counterclaim, to recover damages for injury done to the main building in detaching the “lean-to”; and a set-off of damages and costs was directed. *Semble*, that the “lean-to” was not a fixture.



In *Hunt v. Luck* [1902] 1 Ch. 428; 17 T. L. R. 3; 21 C. L. T. 63, Farwell, J., held that intending mortgagees who were aware that tenants of the property were paying their rents to an agent, were not put upon inquiry as to that agent's principal, who claimed adversely to the intending mortgagor.

In 1848 it was laid down that the benefit and burden of covenants which do not run with the reversion [as to which see Article 143, *post*], may be transferred by reason of notice to the party affected: *Tulk v. Moxhay* (1848) 2 Ph. 774, provided they are restrictive covenants or undertakings not to do certain things. A covenant to improve the property being an affirmative covenant, cannot be fastened on the assignee merely by his notice thereof: *Hayward v. Brunswick Building Society* (1881) 8 Q. B. D. 403; 51 L. J. (Q.B.) 73 [C.A.]; *London & South Western Ry. Co. v. Gomm* (1882) 20 Ch. D. 562; *Austerberry v. Corporation of Oldham* (1885) 29 Ch. D. 750; 55 L. J. (Ch.) 633.

But the decisions in *London & South Western Railway v. Gomm*, (*supra*); *Re Nisbett and Potts Contract* [1906] 1 Ch. 386 [C.A.]; [1905] 1 Ch. 388 [Farwell, J.]; *Rogers v. Hosegood* [1900] 2 Ch. 388; *Osborne v. Bradley* [1903] 2 Ch. 446, laying down the rule that a restrictive covenant creates an equitable easement enforceable against any holder of the land except a purchaser for value without notice, have prevailed over the view laid down in *Tulk v. Moxhay* (*supra*); see White & Tudor, 8th ed., p. 201; 13 Hals. 111; and see *Noakes & Co. Ltd. v. Rice* [1902] A. C. 24, and *Formby v. Barker* [1903] 2 Ch. D. 39 [C.A.]; *Rowell v. Satchell* [1903] 2 Ch. 212.

These decisions must be considered in view of the provisions of the various Acts requiring registration of leases. By these Acts some leases require to be registered in order to preserve their priority: others, not requiring registry, are valid provided possession is held under them.

Mr. Armour, in the Article above referred to, says at p. 7: "If, therefore, a purchaser completes his contract and takes a conveyance subject to a lease which

requires registration, and is in fact registered, he necessarily takes subject to it."

"If the lease (still requiring registration) is not registered, the possession of the tenant alone is not that actual notice which is required by our registry laws in order to charge a purchaser for value: *Harty v. Applebey* (1872) 19 Gr. 205; *Sherbonneau v. Jeffs* (1869) 15 Gr. 574; *Grey v. Ball* (1875) 23 Gr. 390; *Roe v. Braden* (1876) 24 Gr. 589; the unregistered lease or deed being fraudulent and void as against a purchaser for value without actual notice of it, the possession under it is also necessarily fraudulent and void against the registered purchaser: *Waters v. Shade* (1851) 2 Gr. at p. 464."

"In other words the possession does not require the purchaser to pursue his inquiries. But here again the purchaser is unsafe if he knows of the possession. Theoretically he need not inquire if the lease is one requiring registry, but is not registered. But the purchaser cannot assume that, and if he knows it as a fact he has notice and takes subject to it. The possession may be a possession under a lease not requiring registry: and in that case he is bound by notice of the possession. For, in the case of a lease not requiring registration, the possession of the tenant under the lease, that is during its currency, is equivalent to registration, and is therefore actual notice to the purchaser: *Davidson v. McKay* (1866) 26 U. C. R. at p. 310."

"The doctrine of the English cases cited then applies only partially, that is where the tenant has nothing to do in order to perfect his title. If he has to register in order to retain priority, and omits to do so, then an innocent purchaser will take a better title than the unregistered tenant has."

*Taylor v. Stibbert*, *Daniel v. Davidson*, *Barnhart v. Greenshields* (*supra*) and *Lewis v. Stephenson* (1898) 67 L. J. (Q.B.) 296, were followed in *Tarrabain v. Ferring* [1917] 2 W. W. R. 381; 12 Alta. L. R. 47; 35 D. L. R. 632 [App. Div.], the case of a lease for three years with an agreement to erect a building upon the demised premises. The judgment was affirmed [1918] 2 W. W. R. 172 [S.C.—Can.].

*The Statutes.*

The Ontario Registry Act, R. S. O. 1914, c. 124, s. 71 (1), provides that "After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, before the registration of the instrument under which the subsequent purchaser or mortgagee claims."

By section 2 (*d*), it is enacted that the word "instrument" shall include (*inter alia*) a lease.

By s. 71 (2) "this section shall not extend to a lease for a term not exceeding seven years, where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years."

By s. 75 "the registration of an instrument, under this or any former Act, shall constitute notice of the instrument, to all persons claiming any interest in the land subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall be the duty of every registrar not to register any instrument, except on such proof as is required by this Act."

[Origin: 10 Edw. VII. c. 60, s. 71 (1), (2) and 74; R. S. O. 1897, c. 136 ss. 39, 87, 92; 56 Vict. c. 21, ss. 39, 84; 57 Vict. c. 40].

*Similar Legislation.*

To s. 71 (2), Ont.

Manitoba: The term is three instead of seven years: R. S. M. 1913, c. 172, ss. 3.

New Brunswick: Any lease for a term exceeding three years is void against subsequent purchasers whose conveyances are previously registered, but leases for a term not exceeding three years where the actual possession goes along with the lease do not require registration: (1920) 10 Geo. V. c. 6, s. 29 (3).

Nova Scotia: Leases of land for a term exceeding three years are void against any subsequent purchaser, mortgagee for valuable consideration or judgment creditor, unless such leases are previously registered and a reasonable rent reserved in good faith therein: R. S. N. S. 1900, c. 137, s. 20.

The Land Titles Act (1904) 4 Edw. VII. c. 47, s. 63, provides that leases for a longer term than three years may be registered in place of being recorded. And see *Tom Gung v. Fong Lee* (1915) 48 N. S. R. 317.

There may be a conveyance of the reversion subject to a lease: *Pepper v. Butler* (1876) 37 U. C. R. 260, per Wil-son, J. And such a conveyance will not give priority over the lease merely because of prior registration: see *Downs v. Gordon* (1861) 10 N. B. R. 174. It is not necessary to register as against the purchaser of an adjoining lot not covered by the lease: *Roan v. Kronsbein* (1886) 12 O. R. 197.

In Ontario [and also New Brunswick] it would seem that every lease requires registration unless accompanied by actual possession. Where such possession did not go with an unregistered lease for five years, it was held to be postponed to a subsequent mortgage taken and registered without actual notice before the tenant took possession: *Kinnear v. Aspden* (1892) 19 A. R. 468. A lease which does not require registration by reason of the duration of the term is if the tenant is in actual possession, protected against a deed subsequently executed which conveys the premises and is registered. But a tenant having possession under a current lease cannot set up that possession as sustaining a lease for a term to commence *in futuro*, for such possession cannot be said to go along with a lease under which, as yet, there is no right of entry or possession: *Davidson v. McKay* (1866) 26 U. C. R. 306.

To bring a lease within the provisions of a statute which dispenses with registry, where the actual possession and occupation go with the lease, it is not necessary that the execution of the lease and the possession of the land should be exactly concurrent acts. Thus a lease for two years made on the 14th July and possession taken

under it on the 18th July, will not be avoided by a deed of bargain and sale duly acknowledged on the 3rd of August: *Sutherland v. Walter* (1840) 3 N. B. R. 141.

The 9 Vict. c. 38, s. 18, did not extend to or require the registration of a lease for a term not exceeding twenty-one years, where "the actual possession goeth along with the lease." When this Act was in force A. leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term unless he should choose to pay for the improvements. This lease was registered. The lessees then assigned part of the premises, but the assignee did not register. C. devised his interest to B., who subsequently mortgaged the whole of the premises to the plaintiffs. This mortgage was registered and the habendum was subject to the lease. It was held that the covenant for renewal did not extend the term so as to make it a lease for twenty-one years or more, and that the unnecessary registration of it did not make it necessary to register the assignment, and therefore the mortgage to the plaintiffs could not affect the premises demised in the hands of the assignee: *Doe d. Kingston Building Society v. Rainsford* (1852) 10 U. C. R. 236.

A lease of land for four years, with a covenant for renewing for four years more if the premises are not sold, does not require registration where actual possession goes along with the lease, and such lease unregistered is valid as respects the covenant for renewal as between the lessee and subsequent mortgagees of the lessee who register. The latter will be bound to grant the renewal. The Court held that registration was not required for the equitable term created for the period beyond the first four years any more than for the legal term, nor did the fact that the term was determinable on a sale of the premises make registration necessary: *Latch v. Bright* (1870) 16 Gr. 653. The case of *Doe d. Kingston Building Society v. Rainsford* (*supra*), was disapproved of in so far as it holds that an equitable term requires registration.

After an assignment by the lessee without leave of part of a lot was registered, the lessors took a surrender of part of the same lot demised by another lease and registered it, and the court held that the registration of the assignment without leave was not notice of it to them, as they were not bound by the nature of the surrender to examine the register as to that part of the lot affected by the assignment without leave: *Baldwin v. Wanzer* (1892) 22 O. R. 612.

In *Clinch v. Pernette* (1895) 24 S. C. R. 385, affirming *Pernette v. Clinch* (1893) 26 N. S. R. 410; 15 Occ. N. 265, considered at p. 965, it was held that the memorandum was not a deed, nor a lease as defined by the Registry Act, R. S. N. S., 5th ser., c. 84, and that s. 25 only applied to leases for years, and there was sufficient evidence of notice.

In *Hare v. Krick* (1907) 9 O. W. R. 958; 8 O. W. R. 620, it was held that the possession of a tenant in actual possession under a verbal lease for less than seven years was notice to subsequent lessees. It was also held that lessees in good faith without notice of the rights of a prior lessee are not entitled to make forcible entry even though their title might prevail.

### *The Land Titles Acts.*

By the Ontario Land Titles Act, R. S. O. 1914, c. 126, s. 24 (1) (*d*), all registered land, unless the contrary is expressed on the register, is subject to any lease or agreement for a lease for a period yet to run which does not exceed three years where there is actual occupation under it.

British Columbia, R. S. B. C. 1911, c. 127, s. 22 (*d*) as amended by (1913) 3 Geo. V. c. 36, ss. 8, 9. And see *Re Land Registry Act* (1914) 6 W. W. R. 1587 [Morrison, J. —B.C.].

Alberta: (1906) 6 Edw. VII. c. 24, s. 43 (*d*), the land is subject to any subsisting lease or agreement for a period not exceeding three years where there is actual occupation under it.

Manitoba: R. S. M. (1913) c. 171, s. 78 (*d*).

Nova Scotia: Stat. (1904) 4 Edw. VII. c. 47, s. 41, applies to a lease or agreement for a lease for any period yet to run not exceeding three years where there is actual occupation under it.

Saskatchewan: (1917) 7 Geo. V. (2 Sess.), c. 18, s. 60 (*d*).

It was not the intention that a purchaser from a registered owner of leasehold lands under s. 2 of the Land Titles Act, should be obliged to take the land subject to unregistered estates rights, interests or equities of which he had no notice: *McLeod v. Lawson*; *McLeod v. Crawford* (1906) 8 O. W. R. 213; 26 C. L. T. 575 [C.A.], varying (1906) 7 O. W. R. 519; 26 C. L. T. 342 [Mabee, J.].

A lease for a year certain which reserves to the tenant the right to renew from year to year for a term exceeding three years from the making is not a lease "for a term of more than three years" within the meaning of s. 54 of the Alberta Act: *Le Corporation Episcopale de St. Albert v. Sheppard & Co.* (1913) 3 W. W. R. 814; 23 W. L. R. 282 [Scott, J.—Alta.].

### *Registration of Leasehold Title.*

This is provided for in various Land Titles Acts: R. S. O. 1914, c. 126 [Part ii.], ss. 16 to 21.

The Saskatchewan Land Titles Act (1917) 7 Geo. V. c. 18, s. 92, s.-s. (2), provides that a lessee for a life or lives or for a term in land for which the grant from the Crown has been registered may apply to have his title registered.

On registration a certificate of title for the leasehold interest should not issue, but the registrar should retain possession of the duplicate certificate of title of the land: *In re the Land Titles Act, Olsen Lease* [1920] 1 W. W. R. 739 [Sask.—Milligan, M.T.].

The Alberta Act (1906) 6 Edw. VII. c. 24, s. 26 (5) is similar.

See *re the Land Titles Act* (1913) 4 W. W. R. 677 [Alta.—Beck, J.].

A lease of lands containing quarriable stone, issued by the Minister of Interior under the Dominion Lands Act, 7 & 8 Edw. VII. c. 20, s. 38, although not being in the form of letters patent, is in effect a grant of Crown lands for years, and consequently registrable as such under the Alberta Land Titles Act, 1906, c. 24, s. 2 (*v*). Sec. 26, ss. 1 of that Act does not apply: *Re Land Titles Act* (1913) 11 D. L. R. 673 [Beck, J.].

#### *Attornment.*

Formerly, at common law, if the landlord granted or assigned his reversion to another, such assignment would not be valid unless the lessee attorned tenant to the assignee, *i.e.*, consented to the grant. (Shep. Touch. 253).

#### *The Statute of Anne.*

Attornment is now rendered unnecessary by the statute 4 Anne, c. 16, ss. 9 and 10, which provide that all grants or conveyances of rents, reversions or remainders shall be effectual without the attornment of the tenants, but no tenant shall be prejudiced by payment of rent to any grantor, or by breach of any covenant for non-payment of rent before notice to him of such grant.

#### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 15.

New Brunswick: C. S. N. B. 1903, c. 152, s. 32

Ontario: R. S. O. 1914, c. 155, ss. 61 (1) (2).

Saskatchewan: 9 Geo. V. c. 79, ss. 49 (1), (2).

The above provision being expressly limited to a breach of a condition by non-payment of rent, it is not necessary to give notice in case of a forfeiture for breach of any of the other covenants in the lease, *e.g.*, a covenant to repair: *Scaltock v. Harston* (1875) 1 C. P. D. 106. The statute applies to leases in writing merely, as well as to those under seal: *Brydges v. Lewis* (1842) 3 A. & E. N.S. 887.



Though the 4 Anne, c. 16, s. 9, dispenses with attornment in case of the grant of the reversion, it only does so in relation to a tenant who has an estate in the land. Where the tenant has parted with his estate, the Act does not apply. Where after a parol demise the lessor and lessee assigned their respective interests, but the assignee of the lessee was never accepted as tenant, it was held that the assignee of the reversion could not sue the original lessee for there was neither privity of estate or contract between them: *Allcock v. Moorehouse* (1882) 9 Q. B. D. 366.

### *Attornments to Strangers.*

By 11 Geo. II. c. 19, s. 11, attornments made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby, unless made "pursuant to and in consequence of some judgment at law, or decree or order of a court; or made with the privity and consent of the landlord or landlords, lessor or lessors; or to any mortgagee after the mortgage is become forfeited."

### *Similar Legislation.*

New Brunswick: C. S. N. B. 1903, c. 152, s. 33.

Ontario: R. S. O. 1914, c. 155, s. 60.

Saskatchewan: 9 Geo. V. c. 79, s. 48 (1), which also added s. 48 (2). "Nothing herein contained shall alter, prejudice or affect any rights which a mortgagee or incumbrancee may now possess under any law or statute."

The above statutes were re-enacted in Ontario in 1911 [1 Geo. V. c. 37, ss. 61 and 60 respectively], and see R. S. O. 1897, vol. III. c. 342, ss. 24 and 23 respectively. Prior to that they had been held to be in force in Ontario: see *Mulholland v. Hardman* (1884) 6 O. R. 546; *McLennan v. Hannum* (1880) 31 U. C. C. P. 210.

### *Rent.*

Rent accruing due is an incorporeal hereditament, but rent which has accrued due is a mere chose in action.

A conveyance of the reversion will pass rent accruing due, but it will not pass rent which has accrued due, unless expressly assigned, since it is not incident to the reversion: *Sharp v. Key* (1841) 8 M. & W. 379; *Salmon v. Dean* (1851) 3 Macn. & G. 344; *Brown v. Gallagher* (1914) 31 O. L. R. 323.

“Though the assignment would give to the assignee the entire title to the rent to become due on the quarter day next after the assignment, yet it was clear that the assignment would not, at law, pass the antecedent rent; for it had been severed from the reversion and was a mere chose in action”: Per Shadwell, V.C., in *Flight v. Bentley* (1835) 7 Sim. 148, at p. 151.

An assignment of all “debts, accounts and moneys due or accruing due,” and “all contracts, securities,” etc., will not pass over due rent *quâ* rent, but only as an ordinary debt, and if there is no assignment of the right to distrain, the assignee cannot exercise such right, but is confined to his recourse by action. In *Re Edmonton Law Stationers Ltd. (In Liquidation) & The Canadian Bank of Commerce* [1919] 2 W. W. R. 869; [1919] 3 W. W. R. 406 [App. Div.]. The decision in this case follows the principle laid down in *Flight v. Bentley* (*supra*), though the latter case does not appear to have been cited.

As to rent partly due before and partly after an assignment, see *Rickett v. Green* [1910] 1 K. B. 253.

The assignee could not, formerly, either sue for rent due before the assignment or distrain, while the assignor lost his right of distress and could only sue for the rent: *Wittrock v. Hallinan* (1856) 13 U. C. R. 135; *Dauphinais v. Clark* (1886) 3 M. R. 225; *Fairlie v. Denton* (1828) 8 B. & C. 395.

Under R. S. O. c. 109, s. 49, any debt or other legal chose in action is assignable by writing, providing that it does not purport to be by way of charge only, and providing express notice in writing shall have been given to the debtor, and such assignment will be effectual in law, subject to all equities, to transfer the legal right to such debt or chose in action from the date of such notice,

and all legal and other remedies for the same and the power to give a good discharge therefor.

*Similar Legislation.*

Alberta: C. O. c. 21, s. 10 (14).

British Columbia: R. S. B. C. 1911, c. 133, s. 2 (25).

Manitoba: R. S. M. c. 46, s. 26 (e).

New Brunswick: C. S. N. B. 1903, c. 111, ss. 155-7.

Nova Scotia: R. S. N. S. 1900, c. 155, s. 19 (15).

Saskatchewan: R. S. S. 1909, c. 146, s. 1.

The above enactment is substantially a re-enactment of the Imperial Judicature Act, 1873, s. 25, s.-s. 6.

Where a lessor covenanted that he would, at the expiration of the term, pay the lessee, his heirs or assigns, a valuation for the buildings on the lot, it was held that the assignee of the term could, by virtue of the provisions of the statute, sue the lessor in his own name for the value of the buildings. It was held not necessary to the right of action that the covenant should run with the land, for, under the statute, the plaintiff was assignee of the covenant: *Re Haisley* (1879) 44 U. C. R. 345.

The statute only applies to absolute assignments, not by way of pledge or mortgage, and where the statute does not apply the action must be in the name of the assignor. A lessee assigned all claim under his lease as security only for money lent by the assignee, with power to the latter to use the lessee's name for collecting a claim of \$400 due from the lessor to the lessee; and it was held that, as the statute did not apply, the lessee might sue in his own name: *Dawson v. Graham* (1877) 41 U. C. R. 532, following *Hostrawser v. Robinson* (1873) 23 U. C. C. P. 350.

It would seem that there may be an assignment of any covenant in a lease whether it run with the land or not, provided the assignment be not by way of security, and the assignee may sue in his own name. Covenants which run with the land do not require an express assignment, and the owner of the land for the time being sues or is sued thereon in his own name.

Where the assignment is absolute in form, though as a matter of fact the assignor retains a right to a part of the money, an action on the covenant must be brought in the name of the assignee: *Ward v. Hughes* (1885) 8 O. R. 138.

One of several instalments due on a lease, mortgage or bond may be assigned under the Act: *Wellington v. Chard* (1872) 22 U. C. C. P. 518; see further as to assignments of choses in action: *Cole v. Bank of Montreal* (1876) 39 U. C. R. 54; *Wood v. McAlpine* (1877) 1 A. R. 234; *Mitchell v. Goodall* (1879) 44 U. C. R. 398; 5 A. R. 164.

Where the lessors, who were mortgagees, were paid the insurance money on the premises being burned down, and therefore having no beneficial interest, refused to take or suffer the owner to take any proceedings in their name to enforce payment of the rent, the Court made a decree for payment at the suit of the party beneficially interested: *Finlayson v. Elliott* (1874) 21 Gr. 325.

In Nova Scotia, the Court was equally divided on the question whether, since the Judicature Act and rules which follow the Imperial Act (1873) 36 & 37 Vict. c. 66, s. 25, s.-s. 6, the assignee of a chose in action can sue in the assignor's name in the case of an absolute assignment: see *McCurdy v. McRae* (1890) 23 N. S. R. 40.

A landlord borrowed money from the plaintiff and gave him a letter addressed to his tenant, of which the tenant had notice, directing him to pay to the plaintiff the rent until the order should be countermanded, and this was held an absolute assignment within the Imperial Judicature Act: *Knill v. Prowse* (1884) 33 W. R. 163.

### *Equitable Principles of Assignment.*

A chose in action, though not assignable at law, is assignable in equity, and no particular form of words is necessary: 1 White & Tudor, L. C. (8th ed.) 105.

In equity, if property is assigned, and at the same time the benefit of a contract or covenant specifically concerning such property is also assigned, the right to the enforcement of such contract or covenant will also pass,

although at law the contract or covenant is not assignable, and although the contract or covenant is not one which, according to the rules of the common law, runs with the land: *Alberta Brick, etc., Co. v. Nelson* (1888) 27 N. B. R. 276, per King, J., at p. 286.

And, as has already been shown, *ante*, p. 1021, the benefit and burden of covenants, though not running with the land, go to the assignee with notice on the principle enunciated in the leading case of *Tulk v. Moxhay* (1848) 2 Ph. 774.

### ASSIGNMENT OF THE TERM.

ARTICLE 138.—Any one, other than a tenant at will or at sufferance, who has a leasehold term, estate or interest in lands or tenements, may dispose of his estate therein by assignment, unless expressly restrained from so doing by some condition in his lease.

[Authorities: *Doe d. Mitchinson v. Carter* (1798) 8 Term Rep. 57; *Church v. Brown* (1808) 15 Ves. 258].

An assignment of his interest by a tenant at will is an act incompatible with the nature of his tenancy, and determines the will (see p. 802). Such an assignment confers no interest in the land as against the landlord (Tudor's Cases on Real Property, p. 20).

A tenancy at sufferance cannot be assigned so as to bind any person, except the tenant at sufferance (*Shopland v. Rydler* (1603) Cro. Jac. 55).

An assignment, as distinguished from an underlease, is a transfer of the whole term, leaving no reversion in the assignor: *Annis v. Corbett* (1845) 1 U. C. R. 303; *O'Connor v. Peltier* (1908) 18 M. R. 91; 8 W. L. R. 576 [Macdonell, J.], and the effect will be the same even though the rent and a power of re-entry are reserved to the assignor, and not to the original lessor: *Hicks v. Downing* (1696) 1 Ld. Ray. 99; *Palmer v. Edwards* (1779) 1 Doug. 187n; *Pascoe v. Pascoe* (1837) 3 Bing. N. C. 898; *Thorne v. Woollcombe* (1832) 3 B. & Ad. 586.

An underlease of the whole term operates as an assignment, and where the assignee of the reversion sued on a covenant to repair, and it appeared that defendant was the representative of a person who had made an underlease ending at the same date as the original term, it was held that defendant was not liable, the term not being vested in him: *Beardman v. Wilson* (1868) L. R. 4 C. P. 57; 38 L. J. C. P. 91. Furthermore, if a lessee for years makes a lease for a term greater than his own it operates as an assignment: *Hicks v. Downing, supra*; *Woolaston v. Hakewell* (1841) 3 M. & G. 297; *Spencer's Case*, 1 Sm. L. C. (12th ed.) 62 and notes.

It is to be noted though that as between the original lessee and his lessee, even where the demise is of the whole term, if the parties intend a lease, the relation of landlord and tenant will arise between them as to all but strict reversionary rights, and the demise will be as between themselves a lease and not an assignment: *Pollock v. Stacy* (1846) 9 Q. B. 1033; 16 L. J. (Q. B.) 132; *Williams v. Hayward* (1859) 1 E. & E. 1040; *Baker v. Gostling* (1834) 1 Bing. N. C. 19; *Preece v. Corrie* (1828) 5 Bing. 24; *Pascoe v. Pascoe, supra*. This principle will only apply where the action lies between the immediate parties to the contract, and there is no reason as regards themselves why their contracts should not have full operation as they intended them to operate. But when third parties are concerned, the rights of such others must be governed by the legal effects of the acts that have been done, and as we have seen, the general rule is that if there be lessor and lessee for a term, and the lessee convey all his term or more than his term so that he has no reversion, that this is an assignment so far as the original lessor is concerned, per A. Wilson, J., in *Selby v. Robinson* (1865) 15 U. C. C. P. 370, at 374. In the above case a lessee of land for five years demised for seven years, and this was held an assignment of the original term, conferring on the original lessor, in respect of the privity of estate thus created, a right of action against the assignee of the term for the arrears of rent

due under the original lease. But the privity of estate will be destroyed when the reversion determines. So if a lessee makes a sub-lease there is no privity of estate between the parties after the end of the term, and if the original lessee acquires the fee after the term has expired, he can eject the sub-lessee without notice to quit or demand of possession: *Doe d. Wismer v. Hearn* (1849) 6 U. C. R. 193.

The provisions of the Ontario Conveyancing and Law of Property Act providing for covenants to be implied in every conveyance made by deed have already [p. 164, *ante*] been referred to..

The section also provides that:

“22 (b). In a conveyance of leasehold land for valuable consideration, other than a mortgage, the following further covenant, by the person who conveys, and is expressed to convey, as beneficial owner [is implied]:

“That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of the conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance.”

#### *Similar Legislation.*

Ontario: R. S. O. 1914, c. 126, s. 53 (a), [The Land Titles Act]: s. 53 (b) provides for a covenant by the transferee to pay rent and perform covenants.

#### *Mortgages of Leases.*

A lessee may mortgage his term in either of two ways; he may (1) assign the term to the proposed mortgagee, or (2) grant him a sub-lease.

A mortgagee of the whole term is subject to the covenants in the original lease as long as he holds the estate, and a mere sale under foreclosure proceedings will not relieve him before the term vests in the purchaser by conveyance or order of the Court: *Magrath v. Todd* (1866) 26 U. C. R. 87.

The mortgagee is liable on the covenant for rent though he has never entered: *Cameron v. Todd* (1863) 22 U. C. R. 390; *Roaf v. Garden* (1873) 23 U. C. C. P. 59. The rule is that the assignee of a term, whether by way of mortgage or otherwise, may be sued on the covenants which run with the land, although he has not taken actual possession: *Williams v. Bosanquet* (1819) 1 Brod. & B. 238. In this case the lease in question was under seal and was assigned by deed to mortgagees, and so there was privity of estate between the lessor and mortgagees. Where, however, an agreement not under seal for a lease was mortgaged by way of assignment to mortgagees who never took possession and did not execute the assignment, it was held that the decision in *Williams v. Bosanquet* did not apply, there being no privity of estate or contract between the lessor and mortgagees: *Purchase v. Lichfield Brewery Company* [1915] 1 K. B. 184.

In Woodfall's Landlord and Tenant, 15th ed., at p. 275, it was stated that "if [a mortgagee] becomes assignee [of the whole term] equity will not afford him any relief, though he may offer to forego his charge and lose his money," and for this proposition the learned author cited three old cases: *Anon.* (1701) Freem. Ch. 253; *Casberd v. Att.-Gen.* (1819) 6 Price 411; *Sparkes v. Smith* (1692) 2 Vern. 275.

But this statement was not repeated in the 16th edition. This point came up for consideration in *Jameson v. London and Canadian Loan and Agency Co. (No. 2)* (1899) 30 S. C. R. 14; 19 Occ. N. 373, affirming (1898) 26 A. R. 116; 19 Occ. N. 132.

The plaintiff's lessee, who had covenanted not to assign without the consent in writing of the lessor first had and received, made a mortgage of his term by assign-



ment [see p. 1035], to the defendants, to which the plaintiff consented in writing in part as follows: "I . . . . consent to the within mortgage by way of assignment . . . ."

The mortgagor-lessor having died insolvent the defendants were about to register a discharge of their mortgage to escape their liability. The plaintiff sued for an injunction to restrain their doing so. The Court held, however, that the defendants were entitled to relieve themselves from their liability by releasing the debt and reconveying the security. The old cases referred to above were considered in the Court of Appeal and held not to bear out the statement in Woodfall, 15th edition, and, indeed, to go no further than to lay down "what need not be disputed, that the mortgagee cannot escape liability for breaches of covenants occurring during the time he is assignee by offering to forego his security," per Moss, J.A., at p. 132 [26 A. R.]. This reasoning was accepted in the Supreme Court and see per Strong, C.J., at p. 18, referring to *Williams v. Bosanquet* (*supra*), dictum of Dallas, C.J.

The case also turned upon the form in which the lessor had given his consent to the assignment: see per Strong, C.J., at pp. 17 and 19.

This case was followed in *Fordham v. The Commonwealth Trust Co., Ltd.* (1915) 8 W. W. R. 164 [B. C.—Clement, J.].

A mortgagee may avoid the liability of an assignee by taking an underlease, and this is the course usually adopted. In such case a reversion would be left in the mortgagor, and the mortgagee would not be assignee of the whole term, or liable on the covenants in the lease: *Lawler v. Sutherland* (1852) 9 U. C. R. 205; *Annis v. Corbett* (*ante*); *Holford v. Hatch* (1779) 1 Doug. 183; *Derby v. Taylor* (1801) 1 East. 502.

A trustee to whom a lease is assigned to secure an annuity to a third person is an assignee of the term and liable: *Gretton v. Diggles* (1814) 4 Taunt. 766.

In such a case a reversion in the mortgagor is reserved usually by granting the residue of the term less

one day, which should be stated to be the last day of the term. The reservation of a day generally, without stating it to be the last day of the term, is insufficient to give it the character of a sub-lease: *Jameson v. London and Canadian Loan and Agency Co.* (1897) 27 S. C. R. 435; 17 Occ. N. 320, reversing the judgment of the Court of Appeal; (1896) 23 A. R. 602; 16 Occ. N. 285, and restoring the judgment of Robertson, J., and a Divisional Court dealt with at p. 182, *ante*.

This case was considered and it was held that the assignment of an interest in a lease less one day leaves the assignee a substantial interest in the reversion, in *Re Toronto General Hospital Trustees and Sabiston* (1916) 38 O. L. R. 139; 27 O. W. R. 515, but this decision appears really to have proceeded on the ground that the point was raised for the first time in the Appellate Division after lengthy arbitration proceedings.

T., a lessee for twenty-one years, assigned his term by way of mortgage to B. M. became assignee of the term subject to the mortgage. Later during the term M. purchased the reversion pursuant to a power to do so contained in the lease to T., representing that he was the assignee of the term. It was held that the reversion was bound in M.'s hands for the payment of the mortgage to B. without repayment to him of the purchase money, and that M. was estopped from saying that he had purchased the fee otherwise than as the conveyance to him showed: *Building & Loan Association v. McKenzie* (1897) 28 O. R. 316; 17 Occ. N. 84 [Meredith, C.J.], affirmed (1898) 24 A. R. 599; 18 Occ. N. 283 [C. A.], affirmed *sub nom. McKenzie v. Building & Loan Association* (1898) 28 S. C. R. 407.

In Ontario the Mortgages of Real Estate Act, R. S. O. 1914, c. 112, s. 7, provides:—

“There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject matter or share

thereof expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:—

(a) In a conveyance by way of mortgage, the following covenants by the person who conveys and is expressed to convey as beneficial owner, namely, covenants:

(1) For payment of the mortgage money and interest and observance in other respects of the proviso in the mortgage;

(2) For good title;

(3) For right to convey;

(4) That, on default, the mortgagee shall have quiet possession of the land free from all incumbrances;

(5) That the mortgagor will execute such further assurances of the said lands as may be requisite; and

(6) That the mortgagor has done no act to incumber the land mortgaged;

According to the forms of covenants for such purposes set forth in Schedule B to The Short Forms of Mortgages Act [R. S. O. 1914, c. 117], subject to the provisions of that Act.

(b) In a conveyance by way of mortgage of leasehold property, the following further covenants by the person who conveys, and is expressed to convey, as beneficial owner, namely:

(i) That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in, the lease, or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance; and also

(ii) That the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements, contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them."

*The Liability of the Assignor to the Lessor.*

When a lessee assigns his term the assignment destroys the privity of estate between him and his lessor; but not the privity of contract.

A lessee on assigning over only gets rid of liabilities which arise in consequence of the privity of estate, he still continues liable upon the express covenants in the lease. Therefore an action will lie against the lessee or his executors on a covenant to pay rent, although he has assigned the term and the lessor has accepted rent from the assignee: *Barnard v. Godscall* (1612) Cro. Jac. 309; *Thursby v. Plant* (1669) 1 Wms. Saund. 277 (ed. 1871), in notes; *Spencer's Case* (1583) 5 Co. Rep. 16 (a) 1 Sm. L. C. (12th ed.) 62; *Magill v. Young* (1853) 10 U. C. R. 301; *Boulton v. Blake, supra*. But the old action of debt would not lie after such an assignment and acceptance of rent: *Montgomery v. Spence* (1863) 23 U. C. R. 39.

To an action of covenant for not repairing or paying rent, the lessee pleaded that before breach, with the lessor's consent, he assigned to H. all his estate in the premises; and it was agreed between them that H. should hold for the residue of the term, and the lessee be from

time to time discharged from the covenant; that he accordingly gave up possession to H., who held till the end of the term, and the lessor accepted him as tenant in discharge of the lessee's liability; it was held that the assignment should have been by deed to which the lessor was a party, and though an assignment of the term by a lessee and the acceptance by the lessor of the assignee will prevent the lessor from bringing debt for the rent, he can still maintain covenant: *Montgomery v. Spence* (*supra*). If the lessor be a party to the assignment, and agree that the term which was determinable at his option shall be absolute, the assignee will not be liable for rent accruing afterwards: *Chancellor v. Poole* (1781) 2 Doug. 764.

It is clear that the lessee may be sued on his express covenants, either by the lessor, or if he have assigned, by his assignee: *Brett v. Cumberland* (1612) Cro. Jac. 521-2; and so may his representative having assets; *Id.*, *Hellier v. Casbard* (1666) 1 Sid. 266; *Pitcher v. Tovey* (1690) 4 Mod. 71. But though the lessee may, after he has assigned and his assignee has been accepted, be sued on his express covenants, it is said he cannot be so on his implied ones: *Williams v. Burrell* (1845) 1 C. B. 492. But as an action of covenant will not lie against the assignee of the lessee except for breaches of covenant happening while he is assignee, the assignee may get rid of his future liability by assigning even to a pauper: *Taylor v. Shum* (1797) 1 B. & P. 21; *Odell v. Wake* (1813) 3 Camp. 394; *Crawford v. Bugg* (1886) 12 O. R. 8; *Emmett v. Quinn* (1880) 7 A. R. 306, Patterson, J. A., at p. 321. But the relief is because the privity of estate is ended, and it is not necessary that the assignment should be to a pauper. It may be to a solvent person: *Beardman v. Wilson* (1868) L. R. 4 C. P. 57; *Emmett v. Quinn*, *supra*. The assignment only relieves the assignor from future liabilities. He cannot in this way get rid of those which have accrued: *Emmett v. Quinn*, *supra*; *Rowe v. Street* (1849) 8 U. C. C. P. 217; *Cuthbert v. Street* (1850) 9 U. C. C. P. 386.

*The Liability of the Assignee to the Lessor.*

The assignee of the term not being a party to the original contract between the lessor and lessee, there can only exist a privity of estate between him and the lessor or assignee of the reversion, and he is only bound to pay rent and perform the covenants during the time such privity exists, and then only such covenants as run with the land. The question of covenants running with the land is discussed under Article 142, p. 1073, *post*.

The liability of the assignee continues only while he is in possession of the premises. He is a constructive tenant of the landlord by the fact of possession, and during such possession he is liable for the rent as well as running covenants: *Moule v. Garrett* (1870) L. R. 5 Ex. 132.

It is not fraudulent in an assignee of a lessee to assign his lease to a pauper for the express purpose of getting rid of his liability for rent by destroying the privity of estate on which alone an action against him could be founded: *Hopkinson v. Lovering* (1883) 11 Q. B. D. 92.

A lessee assigned his term and all other property to the defendants for the benefit of his creditors. The defendants took possession in March and remained until August, disposing of the stock so assigned. They then quitted the premises, having paid rent up to November following. They requested the lessor to take the premises off their hands, but he refused. In January they assigned to a pauper. The lessee knew nothing of this assignment. After the expiration of the term he was sued by the lessor and compelled to pay two quarters' rent, for which and for his costs so incurred he brought assumpsit against the defendants. It was held that the assignment to the pauper could not be treated as fraudulent, and that the lessee could not recover, also that the interest in the lease passed to defendants under the instrument set out in the case: *Magill v. Young* (1853) 10 U. C. R. 301.

It is necessary that the person sought to be charged as an assignee claim and be in possession through the

same estate as the person whom he succeeds, for if he come in by an elder title he is not an assignee: *Roach v. Wadham* (1805) 6 East, 289; *John Brothers Co. v. Holmes* [1900] 1 Ch. 188. So the benefit and burden of covenants only run with the reversion from assignee to assignee, if he have the same reversion to which the covenants were incident, save in the special cases provided for by the 4 Geo. II. c. 28, s. 6; see notes to *Spencer's Case* [*post*, p. 1075].

To get rid of his liability the assignee must assign the whole estate. If he assign part only he will remain liable for so much of the estate as remains in his hands in respect of all covenants running with the land which are in their nature divisible: *Congham v. King* (1630) Cro. Car. 221; *Stevenson v. Lambard* (1802) 2 East. 575; *Twynam v. Pickard* (1808) 2 B. & Ald. 105; *Boulton v. Blake* (1886) 12 O. R. 532.

A tenant from year to year, who underlets for a long term, does not thereby assign all his estate, which may possibly continue longer than the term expressed to be granted by the underlease: *Oxley v. James* (1844) 13 M. & W. 209.

Where a lessee had covenanted to repair during the term, but failed to do so, and after the expiration of the term assigned over, the assignee was held not liable, for there was no privity of estate between him and the lessor. But if the assignment had been during the term, the assignee would have been liable in respect of the continuing breach: *Southwark v. Smith* (1794) 1 W. Blac. 351; *Grescot v. Green* (1699) 1 Salk. 199; *Hawkins v. Sherman* (1828) 3 C. & P. 459.

Notwithstanding assignment, the assignee of the term is liable for any express covenant entered into in the assignment to himself: *Harris v. Goodwyn* (1841) 2 M. & G. 405; 9 Dowl. 409; *Burnett v. Lynch* (1826) 5 B. & C. 589; *Wolveridge v. Steward* (1833) 1 Cr. & M. 644.

The principle in *Tulk v. Moxhay*, already adverted to at p. 1021, *ante*, also applies when the term is assigned and the benefit and burden of covenants which do not run

with the land [as to which see Article 142], may, if restrictive only, be transferred to the assignee of the term.

A. and B., who were brewers and also dealers in ale and stout carrying on their business at the X. Brewery, demised a public house by an indenture in which the term "lessors" was defined to include each of the Messrs. A. and B., "and their each and every of their heirs, executors, administrators and assigns"; and the term "lessee" was defined to include the "executors, administrators and permitted assigns" of the lessee. The lessee covenanted that he would not, during the term, directly or indirectly buy, sell or dispose of upon the premises any ales or stout "other than such as shall have been *bona fide* purchased of the said lessors, or from them or either of them, either alone or jointly, with any other person or persons who may hereafter become a partner or partners with them, or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and be willing to supply the same to the lessee of good quality and at the fair current market price." A. and B. afterwards sold and assigned their brewery, plant, business and good will to C., a brewer, and assigned to him the public house and the benefit of the covenant with reference to the sale of beer; and then A. and B. ceased to carry on business. It was held that the benefit of the covenant was not restricted either to assigns carrying on the same brewer's business, as the lessors, or to assigns, who themselves sold beer, and that whether the covenant ran with the land or not, C., as assignee of the benefit of it, was according to the principle of *Tulk v. Moxhay* (1848) 2 Ph. 774, entitled to enforce it upon the ground that the lessee, having presumably obtained a lease of the house at a lower rent by reason of the restrictive covenant, ought to be restrained from dealing with the house in a way inconsistent with that covenant: *Clegg v. Hands* (1890) 44 Ch. D. 503; 59 L. J. (Ch.) 477 [C. A.].

The principle of the foregoing cases applies to any one who takes a lease as tenant from year to year: *Wilson*



v. *Hart* (*infra*); or an assignment of a lease: *Luker v. Denis* (1877) 7 Ch. D. 227; or an underlease: *Parker v. Whyte* (1863) 1 Hem. & M. 167; *Halloway Bros. v. Hill* [1902] 2 Ch. 612; or becomes a mere occupier of the premises: *Mander v. Falcke* [1891] 2 Ch. 554; *John Brothers Co. v. Holmes* [1900] 1 Ch. 188. If he have notice of covenants entered into by the persons from whom he derives title he will be bound to observe them though such covenants do not run with the land. Express notice is not required, for a lessee has constructive notice of his lessor's title: *Patman v. Harland* (1881) 17 Ch. D. 353; *Tritton v. Bankart* (1887) 56 L. T. 306; 56 L. J. (Ch.) 629; *Ebbetts v. Conquest* [1895] 2 Ch. 377, and is a purchaser *pro tanto* to whom the maxim of *caveat emptor* applies: *Besley v. Besley* (1878) 9 Ch. D. 103; *Clayton v. Leech* (1889) 41 Ch. D. 103 [C.A.]. And see *Woods v. Opsal*, p. 80, *ante*.

A lessee is bound to enquire into and is fixed with notice of all covenants entered into by the lessor in regard to the user of the premises, and is bound by the same whether they run with the land or not. The owner of a freehold house had entered into a covenant with the previous owner that the building should not be used as a beer shop. The house was afterwards let to a tenant from year to year without express notice of the covenant and it was held that although the covenant might not run with the land, the lessee was affected with constructive notice thereof, and the previous owner might restrain any user as a beer shop: *Wilson v. Hart* (1866) L. R. 1 Ch. 463; 35 L. J. (Ch.) 569; 14 L. T. 499; 14 W. R. 748; *Feilden v. Slater* (1869) L. R. 7 Eq. 523; 38 L. J. (Ch.) 379. But a tenant has not constructive notice of a covenant contained in a deed not forming part of the title to the premises: *Carter v. Williams* (1870) L. R. 9 Eq. 678; 39 L. J. (Ch.) 560.

Where a lease contains a covenant that the lessee will not use the premises or permit or suffer them to be used by any person for any noisome or offensive business, an under-lessee having notice of the covenant will not be

bound on the principle of *Tulk v. Moxhay* (*ante*), to take active steps to prevent his own undertenant from violating the covenant. He must do some act to assist in the infringement of the covenant; merely standing by will not be sufficient, though it might be otherwise if the covenant required the lessee to "hinder or prevent" the nuisance: *Hall v. Ewin* (1887) 37 Ch. D. 74; 57 L. J. (Ch.) 95 [C. A.].

A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion: *Clements v. Welles* (1865) L. R. 1 Eq. 200; 35 L. J. (Ch.) 265; 13 L. T. 548.

A covenant by lessees to heat the building, part of which they leased, was held to be binding upon their assignees: *Nankin v. Starland Limited* (1910) 15 W. L. R. 520 [Alta.]. And see *Gardner v. Staples* (1915) 30 W. L. R. 860; 8 W. W. R. 397; 8 Sask. L. R. 149.

*Rights and Liabilities of the Assignor and Assignee of the Term inter se.*

The proper covenants on the part of the assignor of a term of years are, that notwithstanding any act or thing by him made, done, executed or knowingly suffered, the lease is valid and in full force, that all the rent, covenants and conditions have been paid and performed to that time; that notwithstanding, etc., he has power to assign; and for quiet enjoyment by the assignee during the remainder of the term, without interruption by the assignor or any person claiming under him; free from incumbrances by him; and for further assurance: *Baynes v. Lloyd* [1895] 1 Q. B. 820.

The proper covenants on the part of the assignee are, that he will pay the rent and perform the covenants in the lease, and save harmless the assignor from any breach thereof by him or his assigns: *Staines v. Morris* (1812) 1 V. & B. 8; *Wolveridge v. Steward* (1833) 1 Cr. & M. 644; *Bridgeman v. Daw* (1892) 40 W. R. 253; *Dodson v. Downey* [1901] 2 Ch. 621, 623; *Peterborough Hydraulic*

*Power Co. v. McAllister* (1907) 17 O. L. R. 145; 12 O. W. R. 364 [C. A.].

Where the lessee assigned to A. his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements reserved and contained in the original lease," and A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person; after such assignment the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held that the lessee could not maintain an action of covenant against A. in respect of such breach, the words "subject to the payment of rent, etc.," being words of qualification and not words of contract: *Wolveridge v. Steward* [ante].

A lessee of a farm for an unexpired term at a yearly rent payable quarterly gave up possession to an assignee under an invalid assignment. The assignee paid rent to the lessor (who neither accepted nor objected to the assignee as tenant) and then quit on a quarter day without giving the lessee any notice to quit. It was held that there was no implied contract binding the assignee to indemnify the lessee for any rent accruing after the assignee had ceased to occupy, neither was the relationship of landlord and tenant ever established between the parties: *Crouch v. Tregonning* (1872) L. R. 7 Ex. 88; 41 L. J. (Ex.) 97; 26 L. T. 286; 20 W. R. 536.

In an action by the assignor claiming indemnity from the assignee for breaches of the covenant in a lease the Court will merely direct payment on account of breaches already committed, and will not make a general declaration of the assignee's right to indemnity: *Lloyd v. Dimmack* (1877) 7 Ch. D. 398.

Where a party becomes assignee of a tenancy from year to year, determinable on six months' notice, the omission of the lessor to give the notice has been held a sufficient consideration for the assignee's promise to perform the obligations of the assignor: *Lyman v. Snarr* (1861) 10 U. C. C. P. 462.

An eviction out of part of the land will only discharge an assignee *pro tanto*: *Stevenson v. Lambard* (1802) 2 East. 575; *Campbell v. Lewis* (1820) 3 B. & Ald. 392.

Where a lease is assigned and the lessor accepts rent from the assignee, the lessee who has covenanted to pay rent becomes a surety for the latter: *Boulton v. Blake* (1866) 12 O. R. 532; *Moule v. Garrett* (1870) L. R. 5 Ex. 132, affirmed (1872) 7 Ex. 101. The principle of this decision does not apply, however, to an under-lessee—as distinguished from an assignee: *Bonner v. Tottenham, etc., Society* [1899] 1 Q. B. D. 161. And see *Johns v. Pink* [1900] 1 Ch. 296.

But where rent has not been accepted, the mere assignment does not make the lessee a surety. By assigning, the lessee authorizes the assignee to surrender, and if he surrenders a portion of the premises to the lessor the lessee's covenant is not extinguished altogether, and the lessor is entitled to an apportioned part of the rent from the lessee: *Baynton v. Morgan* (1888) 22 Q. B. D. 74; 58 L. J. (Q. B.) 139 [C. A.].

An assignee of a lease is not, after assigning the term, bound to indemnify the lessee against actions for rent by the lessor: *Magill v. Young* (1853) 10 U. C. R. 301.

But the assignee, whether by *mesne* assignments or otherwise, must pay the rent and perform the covenants while he holds the premises. And where the assignee of an assignee neglected to pay rent and keep the premises in repair, in consequence of which an action was brought by the lessor against the lessee, in which the latter was made liable, the Court held that the assignee was bound to indemnify the lessee against the consequences of the action: *Ashford v. Hack* (1840) 6 U. C. R. 541; following *Burnett v. Lynch* (1826) 5 B. & C. 589.

The liability of an assignee to indemnify the original lessee against breaches of covenant in the lease committed during the continuance of his own tenancy is not affected by the covenants which the assignee may have made with his immediate assignor. A lessee of certain premises under a lease containing a covenant to keep in repair

assigned the lease to B., who assigned it to the defendants. The assignment to B., and from B. to the defendants, contained express covenants with the immediate assignors respectively to indemnify them against all subsequent breaches. While the defendants were in possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from the lessee, and it was held that the latter was entitled to recover, for the defendants were bound to discharge all the liabilities which the possession of the estate imposed on them under the terms of the original lease, not merely as regards their immediate assignor, but also as regards the original lessee: *Moule v. Garrett, supra*.

If a lessee who has covenanted to pay rent assigns the term, taking an indemnity from the assignee against payment of rent, and afterwards the lessee is compelled by the lessor to pay the rent, he has not such an interest in the premises as will enable him to treat the payment as a salvage payment in priority to the claim of a mortgagee of the term from the assignee, and the lessee's only remedy will be a personal one on the covenant of indemnity: *O'Loughlin v. Dwyer* (1884) 13 L. R. Ir. 75.

A lessee assigned his lease and the assignee covenanted to perform all the covenants in the lease to be performed by the lessee and to indemnify the latter against them. The lessor sued the lessee for breach of the covenant to repair, and obtained judgment, of which action the assignee had notice. It was held that the assignee must pay the damages and costs in the action, but not interest: *Spence v. Hecter* (1865) 24 U. C. R. 277; *Williams v. Burrell* (1845) 1 C. B. 402; 14 L. J. (C. P.) 98; *Smith v. Howell* (1851) 6 Exch. 730; 20 L. J. Ex. 377; *Penley v. Watts* (1841) 7 M. & W. 601. See *Bulmer v. The Queen* (1893) 3 Exch. Ct. R. 184; 23 S. C. R. 488. See further, as to the assignor's right to indemnity: *Re Russell* (1865) 29 Ch. D. 254; *Boone v. Martin* (1920) 47 O. L. R. 205 [Rose, J.—App. Div.] noted at p. 271 [*ante*].

Where a lessee assigns, without consent, in breach of the covenant, the assignment containing a covenant by

the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is bound by his covenant, and is liable, notwithstanding the non-assent of the lessors, to repay to the assignor rent accruing due after the assignment, paid by the assignor to the lessors under threat of legal proceedings: *Brown v. Lennox* (1895) 22 A. R. 442; 15 C. L. T. 309 [C. A.].

The M. Co., lessees under a lease for 10 years from January, 1903, heavily indebted to the Ontario Bank in 1905, turned all its assets over to the bank, paid the bank \$10,000 and agreed to assign its lease—in consideration of the bank agreeing to pay certain named liabilities and to release and indemnify the M. Co. The bank for a while continued to carry on the business, and the lessors agreed to assign the lease to any nominee of the bank. In 1906 the bank, which had paid rent for the period of its occupation, failed. The lessors sued the M. Co. for rent payable in advance, 1st January, 1907. The M. Co. brought in the bank as third parties, claiming indemnity. It was held, reversing a judgment of the Divisional Court [(1907) 10 O. W. R. 694] and restoring that of Boyd, C. [(1907) 10 O. W. R. 109] that the bank as equitable assignees of the term were impliedly bound to indemnify the M. Co. against the rent subsequently accruing due: *Peterborough Hydraulic Power Co. v. McAllister* (1907) 17 O. L. R. 145; 12 O. W. R. 364 [C.A.].

There was a covenant not to assign without leave but the lessor was willing to give the leave and the Court therefore distinguished *Couch v. Tregonning* (*supra*), and *Moule v. Garrett* (*ante*).

This judgment was affirmed by the Supreme Court (*sub nom. Ontario Bank v. McAllister* (1910) 43 S. C. R. 338.

## COVENANTS NOT TO ASSIGN WITHOUT LEAVE.

ARTICLE 139.—A covenant not to assign without leave is not broken where, although no leave is given: I, an assignment takes place by operation of law;

II, the demised premises are taken in expropriation proceedings not procured by the tenant; III, an assignment is made passing no legal title; IV, where there is a mere letting into possession.

[Authorities: I. *Doe d. Mitchinson v. Carter* (1798) 8 Term Rep. 57; II. *Slipper v. Tottenham and Hampstead Junction Railway Co.* (1867) L. R. 4 Eq. 112; III. *Cornish v. Boles* (1914) 31 O. L. R. 505 [App. Div.]; IV. *McCallum Hill & Co. v. Imperial Bank* (1914) 30 W. L. R. 343; 22 D. L. R. 203; 7 W. W. R. 981 [Sask.—Lamont, J.].

Leases frequently contain a covenant by the lessee that he will not “assign or sublet” the demised premises without the license, leave or consent of the lessor—the wording frequently varies: see the Short Forms Lease, p. 1109, *post*.

In Ontario and Saskatchewan in all such leases there is implied—unless there is an express provision to the contrary—a proviso that the license or consent shall not be unreasonably withheld: R. S. O. 1914, c. 155, s. 23; [see (1914) 4 Geo. V. c. 2, s. 4 (Sch.)]; 9 Geo. V. [Sask.] c. 79, s. 13.

### I. Assignment by Operation of Law.

The question of assignment by operation of law is discussed at large under Article 136.

An assignment by operation of law is no breach of a condition not to assign *ex. gr.* if the lessee becomes bankrupt or the lease be taken in execution: *Philpot v. Hoare* (1741) 2 Atk. 219; *Doe d. Goodbehere v. Bevan* (1815) 3 M. & S. 353; *Doe d. Mitchison v. Carter* (1798) 8 T. R. 57-300. But it would be otherwise if the tenant confess judgment for the express purpose of enabling a creditor to take the lease in execution: *Doe d. Mitchinson v. Carter* [*supra*]; where, however, the lessee is greatly in debt and gives warrants of attorney, on which judgments are afterwards entered, it will be no breach of a covenant not to charge or encumber the term by mortgaging the same: *Croft v. Lumley* (1855) 6 H. L. Cas. 672; 27 L. J. (Q.B.) 321.

It is to be observed that the covenant against assigning or sub-letting in the Short Forms Act [see p. 1109, *post*] goes on to provide that the lessee shall not "otherwise by any act or deed procure the said premises or any of them to be assigned," etc., and this probably has reference to such a state of facts as arose in *Doe d. Mitchinson v. Carter* (*supra*).

A voluntary assignment executed by a debtor of all his estate is, as a general rule, a forfeiture of a condition in a lease not to assign without license. After such assignment the assignee entered into possession of the premises, sold the stock in trade of the insolvents, and the purchaser took possession from him, the assignee also occupying a room there for the management of the estate. It was held that such assignment was a breach of the covenant, and a forfeiture, for the term passed to the assignee under the provisions of the Act, and if any election to accept it were necessary on his part it was shown by his conduct: *Magee v. Rankin* (1869) 29 U. C. R. 257.

This was also laid down in *Holland v. Cole* (1862) 1 H. & C. 67; *Dobson v. Sootheran* (1888) 15 O. R. 15.

The question is dealt with at p. 405, *ante*, and the statutory provisions there set out as to the assignee's election to retain the premises should be considered.

For a lessee to procure his own adjudication as a bankrupt on his own petition, does not work a breach of the covenant: *In re Riggs, ex parte Lovell* [1901] 2 K. B. 16.

## II. Premises Expropriated.

Where a railway company serve a notice under their statutory powers expropriating land held under a lease containing a proviso against assigning without the license of the lessor, this will not be a violation of the proviso: *Slipper v. Tottenham & Hampstead Junction Ry. Co.* (1867) L. R. 4 Eq. 112, unless such an event be brought about by the fraudulent procurement of the lessee: *Doe d. Mitchinson v. Carter* (1798) 8 T. R. 300; and see the provisions of the Short Forms Act, p. 1109, *post*.



III. *Assignment Giving no Legal Title.*

“It is well settled that an assignment to violate such a covenant . . . must be valid and effective in point of law; there must be an assignment at law, and an equitable assignment or document operating only in equity is not enough: *Gentle v. Faulkner* [1900] 2 Q. B. 267 [C.A.], especially pp. 274, 276; *cf. Friary Holroyd and Healey's Breweries Ltd. v. Singleton* [1899] 2 Ch. 261, at p. 263”; per Riddell, J., in *Cornish v. Boles* (1914) 31 O. L. R. 505, at p. 519 [App. Div.] 25 O. W. R. 677; 19 D. L. R. 447; 6 O. W. N. 514; (1914) 31 O. L. R. 505; 5 O. W. N. 799; 19 D. L. R. 447 [Falconbridge, C.J.K.B.], where the Court held that an option not under seal to assign a lease which was required by law to be under seal, even when accepted, did not effect a forfeiture. See particularly the remarks of Riddell, J., at p. 519.

*Cornish v. Boles* (*supra*) was applied by Falconbridge, C.J.K.B., in *Straus Land Corporation Limited v. International Hotel Windsor Limited* (1918) 15 O. W. N. 10; 45 O. L. R. 145; 49 D. L. R. 519, where a hotel company permitting the sale of rubber goods on part of the demised premises was held not to have “sub-let”—but see the judgment of the Appellate Division, per Riddell, J., at p. 150 [45 O. L. R. 145; 15 O. W. N. 411].

To execute a valid assignment of the lease—which is also executed by the proposed lessee—and hold it in escrow, is not to effect a forfeiture when the lease is never delivered: *McCallum Hill & Co. v. Imperial Bank and Merchants Bank* (1914) 7 W. W. R. 981; 30 W. L. R. 343; 22 D. L. R. 203 [Sask.], where Lamont, J., followed *Gentles v. Faulkner* (*supra*), and held that only a valid legal assignment for the residue of the term is a breach of the covenant.

In *McMahon v. Coyle* (1903) 5 O. L. R. 618; 2 O. W. R. 265; 23 Occ. N. 225 [Boyd, C.], it was held that the mere fact that the documents showing transfer were not executed until after the lessor's action for possession was immaterial: the agreement for the assignment had

been made before and possession taken under it, and therefore there was a breach.

A lessee who had covenanted not to assign entered into an agreement with his brother to assign to him an interest in the lease and to pay him a proportion of the profits of a business carried on on the demised premises. It was held that the provisions of the agreement were a mere agreement to assign and not a legal assignment amounting to a breach of covenant which would justify the lessor in treating the lease as forfeited, and that the fact that the brother was on the premises and joined in the payment of the rent had not the effect of converting the agreement into an actual assignment: *Herschorn v. St. Mary's Young Men's Society* (1915) 49 N. S. R. 260.

A covenant "not to let, set, assign, transfer, set over or otherwise part with the premises demised or the lease," is not broken by a deposit of the lease as security for a loan, because though it creates an equitable mortgage it gives no legal title: *Doe d. Goodbehere v. Bevan* (1815) 3 M. & S. 353; *Doe d. Pitt v. Hogg* (1824) 4 Dow. & Ry. (K.B.) 226.

The execution of an assignment of lease to be tendered for the landlord's assent to it was held not to be a breach of the covenant: *Grossman v. Modern Theatres Limited* (1919) 45 O. L. R. 564; 16 O. W. N. 242 [Rose, J.].

#### IV. *Mere Letting into Possession.*

The mere letting into possession is not a breach of the covenant: per Falconbridge, C.J. K.B., in *Straus Land Corporation Ltd. v. International Hotel Windsor Limited* (1918) 15 O. W. N. 10; 45 O. L. R. 145; 49 D. L. R. 519, following *McCallum Hill & Co. v. Imperial Bank* (1914) 30 W. L. R. 343; 7 W. W. R. 981; 22 D. L. R. 203 [Sask.—Lamont, J.], but the Appellate Division seems to have considered there was a sub-letting, see per Riddell, J., 45 O. L. R. 145, at p. 150.

A lessee allowed a firm of real estate agents to use the demised premises: they paid no rent, had no key nor the exclusive use or possession of any part of the prem-

ises. Curran, J., held that they were mere licensees not tenants, that there was no sub-letting and no breach of the covenant: *Peebles v. Crosssthaite* (1897) 13 T. L. R. 198 [C.A.], and *Mashiter v. Smith* (1887) 3 T. L. R. 673, followed: *Just v. Stewart* (1913) 23 M. R. 517, 4 W. W. R. 780.

A covenant not to assign wholly or in part any of the demised premises without the written consent of the lessor will not be broken unless there is a substantial parting with a substantial portion of the demised premises. Allowing a travelling theatre to occupy a portion of the premises at a weekly rent will not be a breach of the covenant: *Mashiter v. Smith* (*supra*).

In *Herschorn v. St. Mary's Young Men's Society* [*ante*, p. 1054], it was held that the presence on the premises of the brother of the lessee as a member of the firm was not to be treated as a sub-letting.

See also *Choderker v. Harrison* (1910) 20 M. R. 727; 15 W. L. R. 687 [C.A.—Robson, J.].

A covenant not to assign without license is not broken unless there be an assignment of the whole term: *West v. Dobb* (1869) L. R. 4 Q. B. 634; L. R. 5 Q. B. 460; 39 L. J. (Q.B.) 190.

Where the covenant is against assigning the whole term, a transfer of part will not work a forfeiture. A lease provided that the lessor might re-enter if the lessee "do or shall at any time or times during the continuance of the said term, let, set or assign over these presents or the term, estate or premises hereby granted, or otherwise part with his interest therein or thereto to any person or persons whatsoever," without the lessor's consent in writing. The lessee, on leaving the country for a time, rented the premises to one J., who was to go out when required; this was held no forfeiture, for the lease did not prohibit underletting or the transfer of a part of the term: *Leys v. Fiske* (1854) 12 U. C. R. 604.

A covenant or condition not to "assign, transfer or set over, or otherwise do or put away the indenture of demise or the premises hereby demised or any part thereof," is not broken by an underlease: *Crusoe d.*

*Blencowe v. Bugby* (1771) 3 Wils. 234; *Church v. Brown* (1808) 15 Ves. 258-265; *Grove v. Portal* [1902] 1 Ch. 727. But a covenant not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term, is broken by the underlease: *Doe d. Holland v. Worsley* (1807) 1 Camp. 20.

When the lessor consents to an assignment of a lease as collateral security, a re-assignment of the lease when the debt is paid off is contemplated and covered by such consent, and the re-assignment is not a breach of the covenant, even though the consent does not show the assignment to be by way of collateral security only: *Fordham v. The Commonwealth Trust Co. Ltd.* (1915) 8 W. W. R. 164 [B.C.—Clement, J.].

A. leased hotel premises to B., the lease containing a covenant not to assign or sublet without leave. When B. took possession there were a number of underleases from month to month. B. raised the rents of the under-tenants. Beck, J., held there was no new tenancy and no breach of the covenant: *Royal Trust Co. v. Bell* (*post*), p. 1060.

#### *Acts Constituting a Breach of the Covenant.*

Where a lessee covenants not to assign the demised premises without the consent in writing of the lessor, and the term by consent becomes vested in two persons in partnership, the assignment by one of his undivided moiety to the other without consent will be a breach of the covenant: *Varley v. Coppard* (1872) L. R. 7 C. P. 505.

Where lessees, who were partners, covenanted that they, their executors, administrators, or assigns, or any or either of them, would not part with the possession of the demised property to any person without the consent of the lessor, it was held that the covenant meant that they would not part with the possession to any person other than themselves or one of them, and where, in consequence of a dissolution of the firm, one partner obtained sole possession of the premises, there was no violation of the covenant: *Corporation of Bristol v. Westcott* (1879) 12 Ch. D. 461 [C.A.]; 41 L. T. 117.

The distinction between this case and that of *Varley v. Coppard* (*supra*), turns on the fact that in the Bristol case the prohibition was against parting with the possession.

In *Loveless v. Fitzgerald* (1909) 42 S. C. R. 254 [considered at p. 971, *post*], Anglin, J., said, at p. 260: "In *Corporation of Bristol v. Westcott*, Jessel, M.R., referring to *Varley v. Coppard*, said: 'I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment,' a remark which is relied upon as casting some doubt upon the earlier case. But in *Langton v. Henson* (1905) 92 L. T. 805, Buckley, J., points out that this was said 'by way of dictum,' and he adds: 'Where one of two joint tenants assigns to another, or, as Sir George Jessel prefers to call it, releases to the other, he does most effectually deal with the estate; he destroys the privity of estate between himself and his lessor; the estate is affected; something has been parted with. The case of *Corporation of Bristol v. Westcott*, in my opinion, leaves *Varley v. Coppard* altogether unaffected.' Hawkins, J., expresses the same view in *Horsey Estate Limited v. Steiger* [1898] 2 Q. B. 259, at p. 264. As partners, the appellant and his former partner were not joint tenants, but tenants in common of the leasehold premises which were partnership property, and therefore a conveyance of the interest of one to the other must be by assignment and not by release. *Varley v. Coppard* . . . has been accepted by leading text-writers as authority for the proposition that an assignment without leave by one of two lessee-partners to the other is a breach of a covenant not to assign without leave. . . . It has been followed since the Bristol case in what appears to be a carefully considered case by a Divisional Court in Ontario, *Munro v. Waller* [see p. 1062, *post*], and should, I think, be now regarded as an accepted authority."

A covenant not to assign without license is broken upon the execution by the lessee (without license) of any deed whereby he parts with the demised premises for

the whole of the residue of his term, although such deed purports to be merely a lease or under-lease for an equal or longer term, at a different rent, payable to himself, and contains other and different covenants and stipulations than those in the original lease. For although such deed may for some purposes operate, as between the parties thereto, as a lease or under-lease: *Doe v. Bateman* (1818) 2 B. & Ald. 168; *Pollock v. Stacey* (1847) 9 Q. B. 1033; but without giving any right to distrain for the rent thereby reserved, the lessor having no reversion: *Parmenter v. Webber* (1818) 8 Taunt. 593; *Preece v. Corrie* (1828) 5 Bing. 24; 2 M. & P. 57; yet as between the parties and the original lessor it operates as an assignment: *Wollaston v. Hakewill* (1841) 3 M. & G. 297, 323; 3 Scott, N. R. 593. An advertisement to under-let or assign is not a breach of contract, if no actual under-lease or assignment be made: *Gourlay v. Somerset (Duke)* (1812-15) 1 V. & B. 68.

A mortgage of the term is a breach of a covenant not to assign or sub-let: *Bacon v. Campbell* (1879) 40 U. C. R. 517. But executing a mortgage on a fixture which by agreement of the parties the tenant has the right to remove, will not be a breach of a covenant against any alienation of the premises without leave: *Moss v. James* (1878) 37 L. T. 715; 38 L. T. 595. Where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, etc., to any person whomsoever, for all or any part of the term, without the license of the lessor in writing; and the lessee, without such license, agreed with a person to enter into partnership with him, and gave him the use of a back chamber, and some other parts of the premises exclusively, and of the rest jointly with himself; it was held to be a breach of the contract against alienation, for which the lessor was entitled to re-enter: *Roe d. Dingley v. Sales* (1813) 1 M. & S. 297. Suffering, without consent, persons to use portions of the lands for the purpose of raising a potato crop is a breach of a stipulation not to suffer any part of the land to be occupied by any other person,

without the consent of the landlord, although it be proved to be the custom of the country for farmers to pursue that course : *Greenslade v. Tapscott* (1834) 1 C. M. & R. 55. Where the covenant was not to assign the whole or any part of the lands demised without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned, it was held to be a breach of the covenant, notwithstanding the lessor's entry: *Collins v. Sillye* (1651) Style, 265. Where during the existence of a lease, containing a proviso for re-entry in case of assignment or under-letting, without license in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, who was not the lessee, to take effect on the expiration of the old lease, it was held that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no license in writing had been granted, as there was a waiver of the forfeiture, if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent: *Doe v. Curwood* (1835) 1 Har. & Wol. 140. It was at one time held that where there is a right of re-entry upon assignment or under-letting, if a person be found on the premises appearing as tenant, it is *prima facie* evidence of an under-letting; and the defendant must show whether the person was a tenant or merely a servant: *Doe v. Rickarby* (1803) 5 Esp. 4; but it has since been laid down that it is not sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession: *Doe v. Paynen* (1815) 1 Stark. 86.

Under a lease of land for ten years from 1st of December, 1871, to one D., the latter covenanted that neither he nor his assigns would assign, transfer, or sub-let the premises without the lessor's consent in writing first obtained with a proviso for re-entry. D. mortgaged his interest to one H. to secure him against an indorsement of a note for D. This note being dishonoured, H. informed the lessor of the mortgage, and that owing to

the latter's absence it had been taken without his consent, whereupon he waived all objections on this ground and declared that he would take no advantage of the omission, and H. then paid the note and afterwards expended a large sum in foreclosing the mortgage and improving the premises. H. then advertised the land for lease. One W. took possession in May, 1874, on the understanding that he was to have the place for five years with the privilege of remaining the whole of the original term at a rent of \$530 a year, and there was to be a written agreement drawn up if possible so as not to affect H.'s lease. W. remained ten months and made improvements, and while in possession sub-let part of the land to one C. for \$300 a year. W. gave up possession to H. in April, 1875, not being able to obtain the written agreement which had been promised him, and on arbitration with H. the arbitrators awarded to W. \$524 in full of improvements, "less \$224 due for rent," on which basis they settled. H. notified C. in October, 1874, not to pay any money for rent unless authorized by H. It was held that H. had sub-let to W., and the covenant against assignment or sub-letting was therefore broken. The court also inclined to the opinion that the lease was forfeited by the dealing between H. and C.: *Bacon v. Campbell* (1879) 40 U. C. R. 517.

Where there is a covenant not to assign or sub-let without leave and the lessor gives his consent to an under-lease, the under-lessee is not as between himself and the head lessor, bound by the covenant, because the covenant by its terms is not broken by a further assignment or underlease by him: *Beck, J., in Royal Trust Co. v. Bell* (1909) 12 W. L. R. 546 at 548 [*Alta.*].

The same Judge also laid it down in the same case that the lessor may only control future dealings of the under-lessee by requiring as a condition to giving his license: 1. The insertion in the under-leases of provisions restricting assignments and requiring the lessee to bind himself to enforce them. 2. That he be a party to the under-lease and that the under-tenant agree not to assign or sub-let without his leave: See *In re Sparks* [1905] 1 Ch. 456.



A lessee who had covenanted not to sub-let without leave, obtained leave and sub-let. His sub-lessee, with his leave, again sub-let. It was held that the original lessor, who had not consented to this latter sub-lease, could not complain of it as a breach of covenant by the original lessee: *Mackusick v. Carmichael* [1917] 2 K. B. 581; 37 C. L. T. 800 [Atkin, J.].

A company—assignees of a lease containing a covenant not to assign without the lessor's consent in writing—went into voluntary liquidation, in which the liquidator, without the lessor's consent, assigned the lease to an insolvent person. It was held that this constituted a breach of the covenant: *Cohen v. Popular Restaurants Ltd.* [1917] 1 K. B. 480; 37 C. L. T. 386 [Rowlatt, J.].

The measure of damages in an action for breach of a covenant not to assign or sub-let without leave is such sum as will as far as money can put the plaintiff in the same position as if he had still the defendant's liability instead of the liability of another of inferior pecuniary ability for breaches both past and future: *Williams v. Earle* (1868) L. R. 3 Q. B. 739; 37 L. J. (Q.B.) 231.

A lease contained a covenant against assigning or sub-letting without leave, and provided that consent should not be unreasonably or capriciously withheld to a responsible assignee or sub-tenant. The lessee without applying for consent sub-let the premises to a person who intended, as he knew, to use them in the dangerous business of a turpentine distillery, and it was held on the premises being burnt down from fire arising from the use thereof for the business for which they were taken, that the loss caused by the fire was the natural result of the breach of the covenant within the rule laid down in *Hadley v. Baxendale* (1854) 9 Exch. 341; *Lepla v. Rogers* [1893] 1 Q. B. 31; and see *Chapman v. Mason and Liniline Co.* (1910) 103 L. T. 390.

While the covenant was broken by an assignment a few days before a quarter's rent payable in advance became due, the lessor was allowed the amount of the quarter's rent, and although he had entered upon the premises, finding them vacant, and put in a new tenant

from whom he received rent for part of the same quarter, the lessee was held not entitled to have the rents so received credited upon the damages: *Williams v. Earle* (1868) L. R. 3 Q. B. 739, applied; *Patching v. Smith* (1896) 28 O. R. 201; 17 Occ. N. 58 [Street, J.].

A sublease is not a breach of a covenant in a lease not to assign. An agreement by the lessee contemporaneous to a lease agreeing to purchase a building on the leased land was, upon the facts, held to be independent of the lease: *Griffith v. Canonica* (1896) 5 B. C. R. 67 [C.A.].

The lessors are entitled to be put in the position they would have been if the covenant had not been broken and they had retained the liability of the original lessee, instead of an inferior liability, but in estimating the value of the liability of the original lessee, allowance must be made for the vicissitudes of business and the uncertainty of life and health. In the result the report of a master giving the landlord all arrears of rent, a sum representing the cash value of all future instalments of rent and all insurance premiums down to the end of the lease, was varied by reducing the damages from over \$3,800 to \$500. The rule in *Williams v. Earle* (1868) L. R. 3 Q. B. 739, was discussed and applied. *Patching v. Smith* (1897) 28 O. R. 201, was considered but not followed by reason of the view taken: *Munro et al. v. Waller* [No. 2] (1897) 28 O. R. 574; 17 Occ. N. 378 [Meredith, C.J.].

See also a Quebec case, *Mayer v. David* (1915) 47 Que. S. C. 493; 35 C. L. T. 744, and *Richards v. Davies* (1920) 89 L. J. Ch. 601.

#### *The Effect of Giving Leave.*

This has already been discussed at pp. 751, *et seq.* [ante].

#### *Relief against Forfeiture.*

See p. 754, *ante*.

#### *Consent by Persons under Disability.*

The Ontario Landlord and Tenant's Act, R. S. O. 1897, c. 170, contained the following section:

“12. Where any person being under the age of twenty-one years, or a lunatic, or a person of unsound mind, shall be seised of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sublet without leave, the guardian of such infant or the committee of such lunatic, or person of unsound mind may, with the approbation of the Judge of the Surrogate Court of the county in which the land is situate, consent to any assignment or transfer of such leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability.”

Similar provisions now appear in the Infant's Act, R. S. O. 1914, c. 153, s. 18, and the Lunacy Act, R. S. O. 1914, c. 68, s. 16 (*l*).

*Similar Legislation.*

Alberta: (1913) 3 Geo. V. (2nd Sess.) c. 13, s. 16 [Infant].

New Brunswick: C S. N. B. 1903, c. 153, s. 5.

WITHHOLDING LEAVE UNREASONABLY.

ARTICLE 140.—Where the covenant not to assign or sublet without leave is followed by a provision that such leave shall not be “wilfully” or “arbitrarily” or “unreasonably” or “vexatiously” withheld, the proviso is not construed as implying a covenant on the part of the lessor not to withhold his consent “wilfully” (or as the case may be), or to impose an obligation on him to give his consent, but if it is so withheld the lessee is released from the obligation of the covenant, and is at liberty to assign without the lessor's consent, and the Court will declare his right to do so.

[Authorities]: (1910) 30 C. L. T. 598 [Article]; *Cornish v. Boles* (1914) 31 O. L. R. 505 [Falconbridge, C.J.

K.B.—App. Div.]; *McCallum Hill & Co. v. Imperial Bank* (1914) 7 W. W. R. 981; 30 W. L. R. 343; 22 D. L. R. 203 [Sask.—Lamont, J.], following *Andrew v. Bridgeman* [1908] 1 K. B. 596; 77 L. J. (K.B.) 272; *West v. Gwynne* [1911] 2 Ch. 1; 80 L. J. (Ch.) 578].

There is an implied proviso that such license or consent shall not be unreasonably withheld in Ontario and Saskatchewan: See p. 1051, [*ante*].

“A ‘wilful refusal’ is a refusal without any reason or if the objection is merely capricious: *In re Windsor Staines and South Western Railway Act* (1850), 12 Beav. 522, at p. 524; ‘a refusal arising from an exercise of mere will or caprice’: *Ex p. Bradshaw* (1848) 16 Sim. 174, at p. 175; *Re Commissioners of Ryde* (1856) 26 L. J. N. S. Ch. 299, at p. 300. ‘Arbitrary’ is ‘where the reason given was capricious, uncertain, or unreasonable’: *Governors of Bridewell Hospital v. Fawkner* (1892) 8 Times L. R. 637; not a ‘fair and reasonable ground’: *Treloar v. Bigge* (1874) L. R. 9 Ex. 151, at p. 155; ‘without any reasonable ground’: *Quinion v. Horne* [1906] 1 Ch. 596, at p. 602,” per Riddell, J., in *Cornish v. Boles* (1914) 31 O. L. R. 505, at p. 508; 5 O. W. N. 799. See also *Bates v. Donaldson* [1896] 2 Q. B. 241; 65 L. J. (Q.B.) 578; ‘unreasonably’; *Lehman v. McArthur* (1867) L. R. 3 Ch. 496; 37 L. J. Ch. 629; ‘unreasonably or vexatiously’; and *Mills v. Cannon Brewery Co. Lim.* (1920) 89 L. J. (Ch.) 354. Where the proposed assignee is unobjectionable and the business to be carried on is the same, withholding of consent would be arbitrary and unreasonable: per Lamont, J., in *McCallum Hill & Co. v. Imperial Bank of Canada and Merchants Bank* (*supra*), following *Bates v. Donaldson* [1896] 2 Q. B. 241, and distinguishing *Barrow v. Isaacs* [1891] 1 Q. B. 417, and *Eastern Telegraph Co. v. Dent* [1899] 1 Q. B. 835.

In *Curry v. Pennock* (1913) 23 O. W. R. 922; 4 O. W. N. 712; 10 D. L. R. 166 (affirmed, App. Div., 24 O. W. R. 357; 4 O. W. N. 1065; 10 D. L. R. 548 1065), Meredith, C.J.C.P., held, on the facts, that the personality of the tenant was very important and that the consent was not unreasonably withheld.

In *Evans v. Levy* [1910] 1 Ch. 452; 31 C. L. T. 978 [Eve, J.], it was held unreasonable in a lessor to refuse to consent to an assignment to his lessee's wife except on condition that the lessee should covenant for payment of the rent and performance of the covenants during the whole residue of the term. *Seemle*, it would have been reasonable to require the husband to covenant as surety for his wife.

Where a lease provides that the lessee shall not assign or under-let without the consent in writing of the lessor, which, however, is not to be withheld in the case of a respectable and responsible person, it is unnecessary to the validity of an assignment or under-lease to a person of that character that the consent of the lessor should be first obtained: *Hyde v. Warden* (1877) 3 Ex. D. 72, C.A.; *Treloar v. Bigge* (*supra*). But as we have already seen the consent should be applied for.

A lease for 14 years of certain land with an iron furnace and mill, and water rights over the river D., contained a covenant by the lessees not to assign or under-let without the consent of the lessors, but such consent was not to be "unreasonably refused or refused to a person of respectability or responsibility." It was held that the lessors were not bound to consent to an assignment to a corporation who were not taking the lease for the purpose for which it was granted: *Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation* (1891) 63 L. T. 834; 39 W. R. 250, but this was overruled in *Wilmott v. London Road Car Co. Ltd.* [1910] 2 Ch. 525 [C.A.].

A lessee covenanted not to assign or under-let without consent which was "not to be arbitrarily or without good and sufficient reasons withheld." An injunction was granted to prevent the lessee from assigning to General Booth, of the Salvation Army, as the use of the property for meetings or band playing might deteriorate other property of the lessors in the neighborhood: *Bridewell Hospital (Governors) v. Fawkner and Rogers* (1892) 8 T. L. R. 637.

Where there is a stipulation not to withhold consent in the case of a respectable and responsible person, a strong reason for a refusal on the part of the lessor must be shown, especially where a heavy rent is reserved by the lease: *Sheppard v. Hong Kong and Shanghai Banking Corporation* (1872) 20 W. R. 459. But there seems nothing to prevent a lessor, at all events in the absence of such a stipulation, from demanding from the lessee a money payment as a consideration for giving his consent: see *Hilton v. Tipper* (1868) 18 L. T. 626; 16 W. R. 888.

The mere fact that the landlord has not objected at the time of the assignee taking possession does not amount to a consent: *Elphinstone (Lord) v. Monkland Iron and Coal Co.* (1885) 11 A. C. 332.

“As to the question whether the consent to the assignment was unduly withheld, the burden was on the lessees to prove their case—it was not for the lessors to prove that they were justified in withholding their consent; and they should not be considered to have withheld their consent unreasonably if, in the action they took, they acted as reasonable persons might have acted in the circumstances. A mere dislike of the proposed assignee is not a reasonable ground: *Sheppard v. Hong Kong, etc. Banking Corporation* (1872) 20 W. R. 459. On the other hand, it could scarcely be said that behaviour on the part of the assignee which indicated that he was a person with whom it would be difficult to get along amicably would not justify a landlord in refusing his consent. And that was the case here: Grossman’s conduct (undertaking to discharge the landlord’s janitor, etc.) was such as to make it impossible to hold that Modern Theatres Limited had met the onus of proving that it was unreasonable for the landlords to persist in their refusal to have him as a tenant”: *Grossman v. Modern Theatres Limited* (1919) 45 O. L. R. 564; 16 O. W. N. 242 [Rose, J.].

A lease contained a covenant by the lessee not to assign without license, and the lessor covenanted not to withhold his license to assign unreasonably or vexatiously. The lessee contracted to assign “subject to the

landlord's approval," and it was held that he was not bound to take legal proceedings to oblige the lessor to give his license, and having used all reasonable efforts to obtain consent, he was at liberty to consider the contract to assign at an end and make his own terms with the lessor, and even to surrender the lease: *Lehman v. McArthur* (1868) L. R. 3 Ch. 496; 37 L. J. (Ch.) 629.

Where a lessee covenants not to assign or under-let without the lessor's consent in writing, "but such consent not to be unreasonably withheld," these words do not amount to a contract either express or implied on the part of the lessor to give consent, but are a qualification of the lessee's covenant and entitle him to assign or under-let after asking permission if the same is unreasonably withheld. The covenant is not to assign if there is a reasonable objection against it on the part of the lessor: *Sear v. House, Property & Investment Society* (1880) 16 Ch. D. 387; 50 L. J. (Ch.) 77.

The words qualify the lessee's covenant and prevent it from operating in any case where the consent is refused without fair, solid and substantial cause. The lessee's course in a case of this kind would not be to sue the lessor for refusal, but to ask consent and then assign: *Treloar v. Bigge* (1874) L. R. 9 Ex. 151.

"But until it has been judicially determined that the withholding of the landlord's consent is unreasonable," the lessee "incurs considerable risk" by assigning without it, "for if he makes a mistake he is liable to forfeiture of the lease. Hence he is entitled to go to the courts for a declaration that the lessor's consent has been unreasonably withheld and such an order has been made in several cases: *Young v. Ashley Gardens Properties Ltd.* [1903] 2 Ch. 112; *Jenkins v. Price* [1907] 2 Ch. 229; *Evans v. Levy* [1910] 1 Ch. 462 [Eve, J.]"; (1911) 31 C. L. T. 978, and see 30 C. L. T. 598, where the principle is criticised.

The lessee or the proposed assignee are both exposed to the risk—and the assignee is not likely to take the risk. If he "refuses to complete the lessee will have great difficulty in compelling him to do so: see *Re Marshall and*

*Salts' Contract* [1900] 2 Ch. 202. Yet it is the lessee's sole remedy. For it is settled that he cannot recover damages from the lessor for withholding the consent: *Treloar v. Bigge* (*supra*); *Evans v. Levy* (*supra*); *Cornish v. Boles* (*ante*); nor can he maintain an action for an injunction or specific performance: *Sear v. The House Property, etc., Society* (1880) 16 Ch. D. 387, since there is no covenant by the lessor to grant the consent": (1910) 30 C. L. T. 598.

In *Lewis & Allenbury Ltd. v. Pegge* [1914] 1 Ch. 782, the length of time it is reasonable to wait for the requested assent is discussed.

If the assignment is made before the request and wilful and arbitrary refusal, a breach of covenant is committed and a forfeiture of the lease is worked: *Cornish v. Boles* (1914) 31 O. L. R. 505; *Currie v. Pennock* (1913) 4 O. W. N. 712, 1065; *Fitzgerald v. Barbour* (1908); 17 O. L. R. 254; 11 O. W. R. 390; 12 O. W. R. 807, affirmed, *sub nom. Loveless v. Fitzgerald* (1909) 42 S. C. R. 254.

The bare breach of a covenant not to assign or sub-let without consent, entitles a lessor to sue for and recover nominal damages, even though the person to whom the assignment or sub-lease is made be one to whom no lessor could reasonably object, for although a capricious or unreasonable refusal of consent might justify the lessee in making an assignment or sub-lease notwithstanding such refusal, still the right of the lessee so to act does not arise until the consent of the lessor has been asked for and withheld: *Lepla v. Rogers* [1893] 1 Q. B. 36. Thus where in a lease for years the lessee covenanted not to under-let the premises without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable or responsible person, and power to re-enter was given to the lessor in case the lessee did not well and truly observe and perform his covenants, and through the mistake of the lessee's solicitor in not examining the original lease a sub-lease was made without applying to the lessor for consent, it was held that the omission to ask consent worked a forfeiture against



which the Court would not relieve, though the under-lessees were respectable and responsible persons and no injury was done by the lease to them: *Barrow v. Isaacs* [1891] 1 Q. B. 417 [C.A.].

### *Costs.*

In *Young v. Ashley* (*supra*) the lessee was ordered to pay the costs; but in *Jenkins v. Price*, followed in *Evans v. Levy*, he escaped costs on the ground that the lessor came for a declaratory judgment only and had no cause of action. However in *West v. Gwynne* [1911] 2 Ch. 1, it was settled that costs would be given; and see *Cornish v. Boles* (1914) 31 O. L. R. 505, at p. 523, per Riddell, J.

## REQUISITES OF A VALID ASSIGNMENT.

ARTICLE 141.—An assignment or grant of a leasehold interest or term of years in lands, tenements or hereditaments must be by deed or note in writing, signed by the party so assigning or granting the same or his agent thereunto lawfully authorised by writing, or by act or operation of law, and in certain cases by deed.

[Authorities: 29 Car. II. c. 3, s. 3, re-enacted by R. S. O. 1914, c. 102, s. 3; R. S. N. S. 1900, c. 141, s. 4; C. S. N. B. 1903, c. 140, s. 8; R. S. B. C. 1911, c. 92, s. 3; 8 & 9 Vict. [Imp.] c. 106, s. 3; re-enacted as R. S. O. 1914, c. 109, s. 9; C. S. N. B. 1903, c. 152, s. 12; R. S. B. C. 1911, c. 92, s. 3].

At common law assignments of leasehold interests were valid even if effected by parol. The Statute of Frauds, 29 Car. II. c. 3, s. 4, first enacted that “no leases, estates or interests, either of freehold or terms of years, or any uncertain interests of, in, to or out of any messuages, lands, tenements, or hereditaments shall at any time be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents

thereunto, lawfully authorized by writing, or by act and operation of law.”

The effect of this section was not to dispense with any evidence required by the common law, but to add to its provisions somewhat of security, by requiring a new and more permanent species of evidence: Agnew on the Statute of Frauds, p. 26; R. S. O. 1914, c. 102, s. 3, does not apply to a lease or an agreement for a lease not exceeding the term of three years from the making at a two-thirds rent: R. S. O. 1914, c. 102, s. 4.

Now, by virtue of the Real Property Act (1845), 8 & 9 Vict. c. 106, s. 3 [Imp.], an assignment of a chattel interest will be void at law if not made by *deed*. This provision has been re-enacted by the legislatures of Ontario: R. S. O. c. 109, s. 9; New Brunswick, C. S. N. B. 1903, c. 152, s. 12; British Columbia, R. S. B. C. 1911, c. 92, s. 3.

The statute applies equally to assignments of the lessor's and lessee's interest in the leased land, and also to assignments of leasehold interests which may be created without writing, *i.e.*, a term not exceeding three years: *Botting v. Martin* (1809) 1 Camp. 317.

It must be noted that an assignment, in writing merely, is not void *in toto*. Under certain circumstances a legal effect will be indirectly given to it. For example, payment of rent by the assignee and acceptance of same by the landlord will be treated as a recognition of the assignee by the landlord and will operate as an estoppel as against the latter: *Darlington v. Pritchard* (1842) 4 M. & G. 783. The tenancy thus created will, in the absence of evidence to the contrary, be presumed to be from year to year (See *ante*, p. 190).

A parol assignment, if otherwise sufficiently certain in its terms, will be enforceable in equity as an agreement to assign, the intention of the parties having been that there should be an assignment and the aid of equity being only invoked to carry that intention into effect. The assignee, consequently, will be entitled to have this agreement specifically enforced: *Parker v. Taswell* (1858) 2 De G. & J. 559; and see *Cornish v. Boles* (1914)

31 O. L. R. 505, at p. 519 [App. Div.]. If the assignee should be let into possession, such possession, since the Judicature Act, is held under the agreement. "There are not two estates as there were formerly, an estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year": Per Jessel, M.R., in *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, at p. 12; *Allhusen v. Brooking* (1884) 26 Ch. D. 539; *In re Maugham* (1885) 13 Q. B. D. 956; *Furness v. Bond* (1885) 4 T. L. R. 457. An assignee of the lease is in an analogous position to the lessee, and if he is in possession and entitled to specific performance, equity will afford him the same protection as he would have been entitled to if the assignment under which he claims had been by deed: See Halsbury, V. 18, p. 582. The practical result of these decisions has been that to a considerable extent, as pointed out in Halsbury (*ib.* p. 385), s. 3 of the Real Property Act 1845 (8 & 9 Vict. c. 106) has been nullified.

Halsbury (*ib.* p. 385) inclines to the opinion that the above decisions would apply equally to an invalid lease of an incorporeal hereditament, provided that the lessee has entered into enjoyment and that specific performance would be ordered. Cozens-Hardy, J., in *Lowe v. Adams* [1901] 2 Ch. 598 at p. 601, however, states that he is not satisfied that the rule applicable to a tenancy of corporeal hereditaments ought to be applied to the enjoyment of an incorporeal hereditament, *e.g.*, a lease of shooting rights. See *Thomas v. Fredericks* (1847) 10 A.

& E. 775; *Adams v. Clutterbuck* (1883) 10 Q. B. D. 403; *Connor-Ruddy Co. v. Robinson-Whyte Co.* (1909) 19 O. L. R. 133; *Burnett v. Lethbridge* (1916) N. Z. L. R. 368.

An agreement to assign a lease is an agreement relating to the sale of an interest in land within the 29 Car. II., c. 3, s. 4, and must be in writing. A lessee of lands verbally agreed to relinquish possession of same to B. and suffer the latter to become tenant thereof for the unexpired residue of his term in consideration of B.'s paying a sum of money towards dilapidations, and B. entered into possession; an action brought by A. on this contract was dismissed on the ground that there was no memorandum in writing, etc., to satisfy the Statute of Frauds: *Buttemere v. Hayes* (1839) 5 M. & W. 456. Similarly, an agreement to obtain an assignment of a lease is required to be in writing: *Horsey v. Graham* (1869) L. R. 5 C. P. 9.

Rent service is an incorporeal hereditament: *Finch v. Gilray* (1889) 16 A. R. 493; *Hopkins v. Hopkins* (1882) 3 O. R. 223, in which there may be an estate, and rent to become due, if assigned from the lessor to a stranger, must be effected by deed. And so must an assignment of rent apart from the land: *Galbraith v. Irving* (1885) 8 O. R. 751.

Rent reserved upon a lease is a chose in action, when it becomes due. See p. 1030.

Such overdue rent is not incidental to the reversion, and will not pass to the assignee of the reversion unless expressly included: *Salmon v. Dean* (1851) 3 Mac. & G. 344.

As to assignment of licenses see Article 2, p. 12, [ante].

A lease may be assigned by the lessor direct to himself jointly with another person or persons: R. S. O. 1914, c. 109, s. 40; R. S. M. 1913, c. 106, s. 5; C. S. N. B. 1903, c. 152, s. 23.

The word "assigns" extends not only to the immediate assignee, but also to assignees *ad infinitum*: *Spencer's Case* (1583) 5 Co. R. 16; *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180-6; 38 L. J. Q. B. 98.

The usual words employed in assignments are "grant, assign, transfer and set over," but no particular words are absolutely required, provided the intention of the parties be sufficiently expressed. But the words must be apt to describe the estate transferred. Thus, where a lessee for life granted all his estate and interest to A. and his executors, it was held not to amount to an assignment, because a grant to a man and his executors could not convey a freehold: *Derby v. Taylor* (1801) 1 East. 502.

### *Transfer of Leasehold Titles.*

The provisions of the Land Titles Acts as to registration of leasehold titles have already been referred to at p. 1024, *ante*.

The duty of the Registrar in case of transfers of registered leasehold titles is defined in the various Acts: Ontario, s. 48.

The effect of such registration is defined: Ontario, ss. 49 to 52.

## COVENANTS RUNNING WITH THE LAND.

ARTICLE 142.—A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land, *i.e.* to the tenant's assignee.

[Authorities: *Spencer's Case* [1583] 5 Co. Rep. 16 (*a*); 1 Sm. L. C. (12th edn.) 62.].

Covenants running with the *land* must be distinguished from those which run with the *reversion*. "At common law covenants run with the land but not with the reversion": 1 Wms. Saund. ed. 1871, 299 note. The sources of authority for the present article are found in the common law, whereas covenants which run with the reversion derive their force from statutory provisions: *i.e.*, 32 Hen. VIII. c. 31, and 4 Geo. II. c. 28. As to these see Article 143, pp. 1082 *et seq.*, *post*.

In dealing with the law relating to covenants running with the land, it must be further noted that covenants between parties holding the relationship of landlord and tenant stand in a class by themselves in so far as the question whether such covenants run with the land or not is concerned. Consequently, as pointed out by Lindley, L.J., in *Austerberry v. Corporation of Oldham* (1885) 29 Ch. D. 750 at 781, the authorities referring to one class of these cases have little, if any, bearing upon another, and must be carefully distinguished.

The question as to whether a covenant "runs with the land" only arises when the tenant has *assigned* his leasehold interest—it does not arise when he makes a sublease. See Article 21.

Further, the doctrine of covenants running with the land is confined to covenants annexed to the land by instrument under seal. An assignment of a parol tenancy does not pass to the assignee any rights of action upon special stipulations between the original landlord and the lessee: *Elliott v. Johnson* (1866) L. R. 2 Q. B. 120. See remarks of Lush, J., at p. 127. But a new relation of landlord and tenant may arise by implication of law from the situation of the parties, as in *Buckworth v. Simpson* (1835) 1 C. M. & R. 834, where there was an agreement not under seal and the assignees of the tenant went into possession and paid rent, it was held that they were liable on the covenant to repair in the original lease as if it ran with the land. Furthermore, it has been suggested by Farwell, L.J., in *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, at p. 619, that the right to sue on a stipulation in the original agreement is a chose in action within the Judicature Act, 1875, s. 25, s.-s. 6, and therefore an assignee could sue in respect of same provided the statutory requirements as to assignment were complied with. See *Rogers v. National Drug and Chemical Co.* [1911] 23 O. L. R. 234; 24 O. L. R. 486 [App. Div.]. It should be noted that, apart from the two preceding cases, an action could have been brought in the name of the original party to the lease provided the tenancy continued: *Bickford v. Parson* (1848) 5 C. B. 920.

The fountain head of the common law pertaining to the subject matter of covenants running with the land is *Spencer's Case* (1583) 5 Co. R. 16 (a); 1 Sm. L. C. (12th ed.) 62. "The case was excellently argued and debated," says the report, "and many differences taken and agreed concerning express covenants and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not."

The following propositions or rules are laid down in or deduced from the principles formulated in this case:

(1) All express covenants which touch or concern a thing *in esse*, being parcel of the demise at the time of the demise, whether "assigns" are named or not, run with the land.

(2) All express covenants which extend to a thing not *in esse* at the time of the demise, but which directly concern or benefit the land, being parcel of the demise, run with the land, if "assigns" be expressly named in the covenants.

(3) All implied covenants run with the land.

(4) Covenants under which the things to be done is merely collateral to the land and does not touch or concern the land demised in any sort of way, do *not* run with the land, even though "assigns" be named.

Of these in their order.

(1) *All express covenants which touch or concern a thing in esse [being parcel of the demise], at the time of the demise.*

The above expression, "being parcel of the demise," is in the words of *Spencer's Case* (*ante*), but the cases have gone further. "It has been held that though the thing to be done is not upon parcel, nor intended to become parcel, of the subject matter demised, yet if the thing to be done is clearly for the benefit, support and maintenance of the subject matter demised, the obligation to do it runs with the land": per Lord O'Brien, L.C.J.,

in *Lyle v. Smith* [1909] 2 I. R. 58, at p. 65. This action was on a covenant to rebuild or repair a sea-wall which was not on any part of the demised premises, but was essential to the protection and preservation of them, and it was held that the covenant ran with the land and bound the assignee of the lessee. See also *Easterby v. Sampson* (1830) 6 Bing. 644.

The following covenants, as being of the above nature, have been held to run with the land:—

To pay rent: *Parker v. Webb* (1703) 3 Salk. 5; *Williams v. Bosanquet* (1819) 1 B. & B. 238. To render services in the nature of rent: *Vyvyan v. Arthur* (1823) 1 B. & C. 410. To allow deductions out of rent: *Baylye v. Hughes* (1628) Cro. Car. 137.

For quiet enjoyment: *Noke v. Awder* (1594) Cro. Eliz. 436; *Campbell v. Lewis* (1820) 3 B. & Ald. 392.

For further assurance: *Middlemore v. Goodhall* (1638) Cro. Car. 503.

To repair: *Dean of Windsor's Case* (1601) 5 Co. R. 24. See *Perry v. Bank of Upper Canada* (1867) 16 U. C. C. P. 404.

To leave in repair houses already in *esse*: *Strode v. Seaton* (1835) 2 C. M. & R. 730; *Martyn v. Clue* (1852) 18 Q. B. 661.

To repair and renew tenant's fixtures and machinery affixed to the premises: *Williams v. Earle* (1868) L. R. 3 Q. B. 739.

Not to plough more than a certain acreage: *Cookson v. Cock* (1606) Cro. Jac. 125.

To manure annually: *Sale v. Kitchingham* (1713) 10 Mod. R. 158.

To expend manure on farm: *Atkinson v. Farrell* (1912) 27 O. L. R. 204 [Div. Ct.]: see p. 846 [ante].

To insure against fire: *Vernon v. Smith* (1821) 5 B. & Ald. 1; *Douglass v. Murphy* (1858) 16 U. C. Q. B. 113.

To pay liquidated damages if the house be let for any immoral purposes: *Howard de Walden [Lord] v. Barber* [1903] 10 T. L. R. 183. See, however, judgment of Wright, J., at p. 184, for exceptional circumstances. "It was a



strong thing to hold that a covenant to pay damages could run with the land." (*Ib.*). See, also, Farwell, L.J., in *Foster v. Elwel Colliery Co.* [1908] 1 K. B. at p. 640.

To reside on the premises during the demise: *Tatem v. Chaplin* (1793) 2 H. Bl. 133. To use them as a private dwelling-house: *Wilkinson v. Rogers* (1863) 2 DeG. J. & Sm. 62.

To allow the lessor access to part of the house not included in the lease: *Cole's Case* (1691) 1 Salk. 196.

To supply good water to houses included in lease: *Jourdain v. Wilson* (1821) 4 B. & A. 266.

In a public house lease, a covenant to conduct the house properly: *Fleetwood v. Hall* (1889) 23 Q. B. D. 35; 58 L. J. (Q. B.) 341; only to sell liquor bought from the lessors and their successors: *Clegg v. Hands* (1890) 23 Q. B. D. 35; 59 L. J. (Ch.) 477; *White v. Southend Hotel Co.* [1897] 1 Ch. 767; 66 L. J. (Ch.) 387; *Courage v. Carpenter* [1910] 1 Ch. 262; *Rudd v. Manahan* (1912) 2 W. W. R. 798, affirmed (1913) 4 W. W. R. 350; 5 Alta. L. R. 19 [Walsh, J.—App. Div.], where the covenant was made subsequently to the lease in consideration for a loan. It was held it was only binding during the life of the encumbrance, and see *Noakes & Co., Ltd. v. Rice* [1902] A. C. 24; 71 L. J. (Ch.) 139.

In a sporting lease, a covenant to leave the land well stocked with game: *Hooper v. Clark* (1867) L. R. 2 Q. B. 200.

To carry all corn produce to the lessor's mill: *Vyvyan v. Arthur* (1823) 1 B. & C. 410.

To consume all hay and fodder on the premises: *Chapman v. Smith* [1907] 2 Ch. 97.

In a mining lease, to pay compensation for injury done to the surface: *Norval v. Pascoe* (1864) 34 L. J. Ch. 82.

To build a new smelting mill in place of an old one: *Sampson v. Easterby* (1829) 9 B. & C. 505, on app. 6 Bing. 644.

To maintain a sea-wall: *Lyle v. Smith*, *ante*, p. 1076.

To renew the term: *Isteed v. Stoneley* (1580) 1 Anderson 82; *Brooke v. Buckeley* (1754) 2 Ves. Sen. 498; *Muller v. Trafford* [1901] 1 Ch. 54.

To endeavour to procure a renewal: *Simpson v. Clayton* (1838) 4 Bing. N. C. 758.

Not to carry on a particular trade on the premises: *Congleton (Mayor of) v. Pattison, post*, p. 1079. See *Arnold v. White* (1856) 5 Gr. 371.

To produce title deeds: *Barclay v. Raine* (1823) 1 Sim. & S. 449.

To observe a restrictive covenant as to a building line on adjoining premises: *Ricketts v. Enfield Churchwardens* [1909] 1 Ch. 544; 29 C. L. T. 429, 754.

Not to assign or sublet without license: *Williams v. Earle* (1868) L. R. 3 Q. B. 739.

To pay for improvements to be executed on the land: This is probably so, but the point has not been expressly decided. See *Gorton v. Gregory* (1862) 3 B. & S. 90; *Mansel v. Norton* (1883) 22 Ch. D. 769.

To pay taxes, when the covenant was by the lessee for himself and his assigns: *Wix v. Ruston* [1899] 1 Q. B. 474; 68 L. J. Q. B. 298; *MacKinnon v. Crafts, Lee and Gallinger* [1917] 1 W. W. R. 1402; 11 Alta. L. R. 147 [App. Div.] where a general provision of the lease declared that the word "lessee" should include the lessee's executors, administrators and approved assigns. It was also held in that case that a proviso for distress for such taxes paid by the lessor after the lessee's default ran with the land. In *McDuff v. McDougall* (1889) 21 N. S. R. 250, the Supreme Court of Nova Scotia held, under the circumstances, that the covenant to pay taxes was a purely personal one.

To erect a building upon premises to be demised, the agreement to erect the building having attached to it a draft of the proposed lease, and purporting to lease the premises and building: *Tarrabain v. Ferring* [1918] 2 W. W. R. 172, affirming [1917] 2 W. W. R. 381; 12 Alta. L. R. 47 [App. Div.].

(2). *All express covenants which extend to a thing not in esse at the time of the demise, but which directly concern or benefit the land being parcel of the demise.*

A covenant in respect of a thing not *in esse* at the time will run with the land and bind an assignee provided, (1) it affects the nature, quality or value of the thing demised, independently of collateral circumstances, or affects the mode of enjoying it, and (2) *the assignee is specifically named*, per Lord Ellenborough, C.J., in *Congleton (Mayor of) v. Pattison* (1808) 10 East. 130, at p. 135; *Spencer's Case*, *supra*.

The following have been held to be covenants of this nature:—

To erect dwelling-houses on the demised premises: *Doughty v. Bowman* (1848) 11 A. & E. N. S. 444. “The covenant, concerning a thing not *in esse* at the time of the demise, does not pass to assigns unnamed,” per Parke, B., at 452.

To rebuild in case of destruction of demised premises by fire: *Emmett v. Quinn* (1881) 7 A. R. 506.

To convey upon a railway to be built upon the demised land all the coal from a certain colliery: *Hemingway v. Fernandez* (1842) 13 Sim. 228.

To pay at a valuation for all fruit trees which should be planted by the lessee: *Grey v. Cuthbertson* (1785) 4 Doug. 351. See, however, Woodfall, p. 193.

The rule that assigns will not be bound by covenants as to things not in existence at the date of the lease unless they are expressly mentioned, is contained in Lord Coke's report of *Spencer's Case* (5 Co. R. 16). It was accepted in *Congleton v. Pattison* and *Doughty v. Bowman*, *supra*, but in *Minshall v. Oakes* (1858) 2 H. & N. 793, Pollock, C.B., strongly assailed the accuracy of the report and impugned the law laid down therein, saying that no reason is given for the alleged differences between where the assignee is and is not named, and that the reason given for binding in any case an assignee not named, *e.g.*, that he takes the benefit and burden, would seem equally to apply to every such case (*ibid.*, p. 808). The

editors of Smith's Leading Cases express great doubt as to the authority of the case, though they remark that there seems to be sound reason in the decision. See vol. 1, pp. 78-81. The Court of Appeal in Ontario had occasion, in *Emmett v. Quinn* (1881) 7 A. R. 306, to consider the point, and the judgments of Spragge, C.J., Burton, and Patterson, JJ., review the authorities at length, it being held that a covenant concerning something not *in esse* at the date of the lease—in this case a covenant to rebuild in case of fire—did not run with the land unless assigns were mentioned. The cases of *Williams v. Earle*, *supra*, and *West v. Dobb* (1870) L. R. 5 Q. B. 460—both decided subsequent to *Minshall v. Oakes*—also support the rule. Reference should be made to the recent case of *Dewar v. Goodman* [*post*, p. 1082], the covenant in question in which, however, was *intended* to bind assigns.

(3) *All implied covenants.*

In the earlier editions of Woodfall it was stated that all implied covenants ran with the land, but in the 19th ed., at p. 189, note (e) the learned editor submits that this statement should be limited to such covenants as are implied *by law* from the fact of the demise, and not to *any* covenant which may be implied from the wording of any particular lease, or from the construction that may be put upon the agreement between the parties: as to which see p. 158, *ante*.

“A covenant in law is an agreement which the law infers from words by which the relation of landlord and tenant is created or from the very relationship itself”: Redman's Landlord and Tenant, 139.

(4) *Covenants under which the thing to be done is merely collateral to the land and does not touch or concern the land demised in any sort of way.*

When the thing to be done under the covenant does not directly affect the nature, quality or value of the thing demised nor the mode of occupying it, *i.e.*, does not relate to nor touch or concern the land, it is called a collateral covenant; it is personal between the original parties and it cannot be made to run with the land, and

will not bind the assignee of the term even though named: *Congleton (Mayor of) v. Pattison* (1808) 10 East 130, at 136; *Horsey Estate Ltd. v. Steiger* [1899] 2 Q. B. 79; *Rogers v. Hosegood* [1900] 2 Ch. 388; *Rudd v. Manahan* (1912) 2 W. W. R. 796, affirmed (1913) 4 W. W. R. 350; 5 Alta. L. R. 19 [Alta.—Ct. en B.].

The following covenants have been held to be merely collateral, and therefore not to run with the land, even though assigns be specifically mentioned:—

To give the lessee an option to purchase: *Woodall v. Clifton* [1905] 2 Ch. 257; to give the lessee an option of pre-empting an adjoining piece of land: *Collison v. Lettsom* (1815) 6 Taunt. 224.

To pay any sum in gross not reserved as rent: *Inchiquin v. Burnell* (1795) 3 Ridg. 376.

To pay taxes in respect of premises other than those demised: *Gower v. Postmaster-General* (1887) 57 L. T. 527.

To build a house upon other land, unless it is to be used in connection with the land demised: *Sampson v. Easterby* (1829) 9 B. & A. 505.

To replace chattels other than fixtures: *Gorton v. Gregory* (1862) 3 B. & S. 90.

To pay for buildings to be erected on the land—assigns not mentioned: *McClary v. Jackson* (1887) 13 O. R. 310.

In a public house lease, not to keep a public house within a certain distance: *Thomas v. Hayward* (1869) L. R. 4 Ex. 311.

Not to hire persons to work on the premises who were resident elsewhere in the neighbourhood: *Congleton (Mayor of) v. Pattison*, *supra*.

A condition for re-entry on conviction of lessee or his assigns for any offence against the game laws: *Stevens v. Copp* (1860) L. R. 4 Exch. 20.

Not to sell hay, etc., grown on the premises: *Lybbe v. Hart* (1885) 54 L. J. (Ch.) 860. See *Chapman v. Smith*, *supra*, as to hay, etc., to be consumed on the premises.

A covenant in an under-lease to perform and to indemnify the under-lessee against the covenants in the original lease: *Doughty v. Bowman* (1847) 11 Q. B. 444; *Dewar v. Goodman* [1907] 1 K. B. 612, on app. [1908] 1 K. B. 94, and [1909] A. C. 72. And see (1909) 29 C. L. T. 291, 754.

To deliver up chattels, other than fixtures, at the end of the term: *Spencer's Case*, *supra*; *Williams v. Earle* (1868) L. R. 3 Q. B. 739.

A covenant that a person should have the use of two undesignated boxes in a theatre: *Flight v. Glossop* (1835) 2 Bing. N. C. 125.

A covenant in an independent document to pay an additional rent in consideration of the enlargement of the premises: *Lambert v. Norris* (1837) 2 M. & W. 333.

A provision for forfeiture if execution should issue against lessee's goods: *Mitchell v. McCauley* (1893) 20 A. R. 272.

*Seemle*, in an hotel lease a covenant from time to time to apply for a license and at the expiration of the lease assign the license to the lessor: *Walsh v. Walper* (1901) 3 O. L. R. 158 [Div. Ct.].

## COVENANTS RUNNING WITH THE REVERSION.

ARTICLE 143.—A covenant is said to run with the reversion when either the liability to perform it or the right to take advantage of it passes to the assignee of the reversion, *i.e.* to the landlord's assignee.

[Authorities: [32 Hen. VIII. c. 34; 18 Halsbury, s. 1123; 1 Sm. Leading Cases [12th ed.] 68].

### *Not the Rule at Common Law.*

At common law before 1540, if the reversion were assigned, the assignee did not get the benefit of any covenant made by the lessee, except for payment of rent. "At common law covenants ran with the land, but not with the reversion. Therefore, the assignee of the lessee

was held to be liable in covenant and entitled to bring covenant, but the assignee of the lessor was not": 1 Wms. Saund. 299 note (b). And see also per Lefroy, C.J., in *Butler v. Archer* (1860) 12 Ir. C. L. R. 104, at p. 127; *Rogers v. National Drug & Chemical Co.* (1911) 23 O. L. R. 234 (Riddell, J.) 24 O. L. R. 486 [C.A.]; *Thursby v. Plant* (1669) 1 Wms. Saund. 238.

On the dissolution of the monasteries in England during the reign of Henry VIII., it was found that the persons into whose hands, including the Crown, the forfeited leases of monastic lands had come, were without remedy for breaches of covenant: See 18 Hals. 586 note (g). To obviate this difficulty, recourse was had to legislation, and 32 Hen. VIII. c. 34, was passed, which, to a certain extent, altered the common law doctrine as to assignments of reversions.

The statute of Hen. VIII., by s. 1, gave to grantees and assignees of the reversion, their heirs, executors, successors and assigns, the like advantages by entry for non-payment of rent or forfeiture, and the same remedies by action for non-performance of conditions or covenants against lessees, their executors, administrators and assigns as the lessors had, and by s. 2, gave lessees the like remedies against assignees of the reversion as they might have had against the lessors.

### *Similar Legislation.*

British Columbia: R. S. B. C. 1911, c. 126, s. 15.

Ontario: R. S. O. 1914, c. 155, ss. 4 and 6.

Saskatchewan: 9 Geo. V. c. 79, ss. 3 and 5.

This statute does not transfer all covenants or conditions, but only those which concern the land demised, *i.e.*, which run with the land and does not transfer collateral covenants (*Thursby v. Plant* (*supra*) at 240; *Webb v. Russell* (1789) 3 T. R. 393). A lease contained a proviso that the landlord might re-enter in case the tenant or occupier be lawfully convicted of "any offence against any of the present or future game laws." The reversion was assigned and subsequently the lessee was

convicted of using a gun for the purpose of killing game without a game certificate. The assignee of the reversion then sought to re-enter for the breach committed by the lessee of the condition contained in the original lease. Held, that the condition could not in any sense be said to touch the thing demised. It was purely collateral and did not run with the land and consequently was not within the statute, and the assignee of the landlord could not enforce a forfeiture for breach of same (*Stevens v. Copp* (1868) L. R. 4 Exc. 20).

The statute applies to leases by deed only: *Standen v. Christmas* (1847) 10 Q. B. 135. Therefore in the case of a lease not under seal, the assignee of the reversion or of the lease, must sue in the name of the original lessor or lessee for breaches of covenant, etc. In *Bickford v. Parson* (1848) 5 C. B. 920, Wilde, C.J., states that there is no reason, in point of law, why, if the right to sue for a breach did not pass with the reversion, it should not remain with the lessor. "The privity of estate was destroyed by the conveyance of the reversion; but the privity of contract was not. That, it is plain, would not have passed with the reversion before the statute; and the statute has no operation where the conveyance is not by deed. It was well said by Shepherd, *arguendo*, in *Webb v. Russell* (1789) 3 T. R. 393, that there are three relations at common law, which may exist between the lessor and the lessee and their respective assignees; first, privity of contract, which is created by the contract itself, and subsists for ever between the lessor and lessee; secondly, privity of estate, which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversion; and thirdly, privity of contract and estate, which both exist where the term and reversion remain in the original covenantors. The statute 32 Hen. VIII. c. 34, seems to have created a fourth relation, a privity of contract in respect of the estate, as between the assignees of the reversion and the lessees or their assignees. The statute annexes, or rather creates, a privity of contract between those who have privity of estate; and when the one fails the other fails



with it. At common law, the covenant did not pass by an assignment of the reversion, for it was a mere personal contract'' (at p. 929).

It has been held that the statute only applies to leases under seal: *Standen v. Christmas* (1847) 10 Q. B. 135, but if a parol lease is assigned and rent has been paid by the tenant to the new remainderman, an agreement will be inferred to continue the tenancy on the same terms as before, and ''a conventional law is thus made equivalent to that of Henry VIII. in the case of leases under seal'': per Willes, J., in *Cornish v. Stubbs* (1870) L. R. 5 C. P. 334 at 339, quoted by Riddell, J., in *Rogers v. National, &c., Co., supra*, at p. 236. The same result was arrived at on the ground of waiver by letter or negotiation in *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. D. 608 [Farwell, J.]. Since the passing of the Judicature Act, the doctrine laid down in *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, has been applied, as in the case of covenants running with the land at common law (see *ante*, p. 1074). The most recent instance is the case of *Rogers v. National, &c., Co., supra*, where it was held that a right of renewal contained in a parol lease was enforceable as against the remainderman.

The statute only extends to covenants which touch or concern the thing demised, and not to collateral covenants: *Spencer's Case, supra*.

The following covenants have been held to come within the statute in this respect:

For quiet enjoyment: see 18 Halsbury, s. 1124.

For further assurance: *Middleman v. Goodale* (1638) Cro. Car. 503.

To renew: *Simpson v. Clayton* (1838) 4 Bing. N. C. 758.

To supply water to houses on the demised land: *Jourdain v. Wilson* (1821) 4 B. & Ald. 266.

To pay rates and taxes: *South of England Dairies Ltd. v. Baker* [1906] 2 Ch. 631.

Not to erect on the adjoining land any building in front of the building line: *Ricketts v. Churchwardens of Enfield* [1909] 1 Ch. 544.

To provide house keeper of suites of offices: *Barnes v. City of London*, R. P. Co. [1918] 2 Ch. 18; 87 L. J. (Ch.) 601.

The statute only deals with the relation of landlord and tenant, and only with covenants directly concerning the tenancy and its terms: *Woodall v. Clifton* [1905] 2 Ch. 257. In this case, the lease gave the lessee an option to purchase the fee simple, upon the exercise of which the lessor, his heirs or assigns agreed to execute a conveyance. Held that the covenant did not run with the land. "It is in reality not a covenant concerning the terms of the lease . . . An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, in our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII. was dealing": per Romer, L.J., *ib.*, at 279.

A covenant that runs with the reversion also runs with the land as a general rule, and as said by Cozens-Hardy, L.J., in *Stuart v. Joy* [1904] 1 K. B. 362, at p. 368, "the position of the lessor with respect to covenants running with the reversion is now precisely similar to the position of the lessee with respect to covenants running with the land." As a consequence, the subject is usually dealt with under the heading of covenants running with the land.

At common law in order to make a covenant run with the land and to sue thereon, privity of estate between the parties was required: *Webb v. Russell* (1789) 3 T. R. 393, and other cases. Now the equitable principle is applied in all courts and a covenant by or with an equitable owner is deemed to run with the land: *Rogers v. Hosegood* [1900] 2 Ch. 388. It should be noted however that this case was not one of landlord and tenant.

Under the statute the assignee of the reversion may sue the lessee for not keeping the premises in repair: *Bennett v. Herring* (1857) 3 C. B. N. S. 370; *Scaltock v. Harston* (*supra*); and may take advantage of all express

covenants which run with the land, as well as covenants in law, though only the lessor and his heirs be named in the lease: *Spencer's case*, 1 Sm. L. C. (12th ed.), 62, and notes thereon.

And the remedy is mutual, for section 2 of the statute gives the lessee a right of action against the grantee of the reversion: *Jourdain v. Wilson* (1821) 4 B. & Ald. 266; *Close v. Belmont* (1875) 22 Gr. 317; *Hilliard v. Beck* (1889) 9 C. L. T. 90.

It is conceived that the R. S. O. c. 109, s. 49, and the statutes of the other provinces of a similar nature, carry the law a step further, and whether the covenant run with the land or not, the assignee of the reversion or term may sue or be sued on any covenant expressly assigned, whether the breach be before or after assignment: see *Re Haisley*, *supra*.

The right of action does not depend on privity of estate. Prior to the Act an assignee of the reversion could not maintain an action upon the covenant though running with the land, unless the breach were a continuing one in respect of something the right to which had been transferred: *Wittrock v. Hallinan* (1856) 13 U. C. R. 135.

Causes of action which accrued previous to the assignment of the reversion would not pass with it under the 32 Hen. VIII. c. 34, so as to enable the assignee to sue for them in his own name: *Wittrock v. Hallinan* (1856) 13 U. C. R. 135; *Hunt v. Bishop* (1853) 8 Exch. 675; *Hunt v. Remnant* (1854) 9 Exch. 635; *Martyn v. Williams* (1857) 1 H. & N. 817; *Cole v. Kelly* (1919) 36 T. L. R. 36. The statute includes devisees: *Machell v. Dunton* (1587) 2 Leon. 33; grantees of part of the reversion: *Attoe v. Hemmings* (1614) 2 Bulst. 281; *Wright v. Burroughs* (1846) 3 C. B. 685; and for some purposes, assignees of the reversion of part of the demised premises: *Twyman v. Pickard* (1818) 2 B. & Ald. 105; *Simpson v. Clayton* (1838) 4 Bing. (N.C.) 758; see notes to *Spencer's case*, 1 Sm. L. C. (12th ed.) 62.

Lessors who had agreed to erect a building upon the demised lands under circumstances requiring them to

make the building suitable for the purposes for which the tenant intended to use it, erected a building which was not suitable, and shortly afterwards assigned the reversion to O. and S. It was held that as the breach of the covenant had taken place before the assignment of the reversion O. and S. were not liable for it, but that as they had, as landlords, attempted to rectify the wrongs suffered by the lessee they must bear the damage arising from the lessor's breach, there being consideration for their undertaking: *Tarrabain v. Ferring* [1917] 2 W. W. R. 381; 12 Alta. L. R. 47; 35 D. L. R. 632 [App. Div.]. This judgment was affirmed [1918] 2 W. W. R. 172, Idington, J., saying, p. 174: "In the *Spencer case, supra*, the lessee had covenanted to build a certain wall on the land. And then after enjoying the land for some time he assigned his term and the question was whether the assignee thereof could be held liable to the lessor for the breach of the said covenant to build a wall. It was held that he could. It does not, however, appear within what time the wall was to have been built. There was the legal position at common law of the assignee of the term. The like liability on the part of the lessor's assignee seemed doubtful and the statute 32 Henry VIII. c. 34, was enacted to define the relations and liabilities of the assignees of a reversion to the tenants of the lessor and first assignor. In the case of *St. Saviour's, Southwark v. Smith* (1762) 3 Burr. 1271; 1 W. Bl. 351, where the covenant was to pull down within seven years certain houses, and the lessor assigned his reversion after the expiration of the seven years, it was held his assignee was not liable because the breach had occurred before assignment. The case of *Johnson v. St. Peter, Hereford Church-wardens* (1836) 4 A. & E. 520; 4 N. & M. 186; 1 H. & W. 720; 5 L. J. K. B. 116, presents a similar decision from the converse point of view of the liability of the lessee continuing after the assignment for breaches before it. The case of *Reeves v. Pope* [1913] 1 K. B. 637; 82 L.J.K.B. 444, relied upon by appellant, clearly does not touch the point in question. That was the case where the building contract was independent of and could not be

made, as in this case, to form part of the lease. Hence there would be no possibility of the former running with the land. I am of the opinion that any obligation to answer damages herein by reason of any breach of the Ferrings' covenant in the lease, must be borne by them. On the facts presented this may not make very much difference in the result. The appellants, O'Brien and Smith, in fact assumed the duty of rectifying the wrongs suffered by respondents by reason of the non-observance of the Ferrings of their covenant. Self-interest dictated something ought to be done by the real landlord to avert the damages likely to be caused by the defective workmanship of their contractors, and from time to time the discharge of this duty was assumed by O'Brien and Smith for over a year, and respondents accepted their assurances and permitted the work to be done which was intended to produce desirable results. Had they not done so the respondents might have been driven to seeking for a rescission of the lease and all implied in the contract upon which it rested."

"There was thus good legal consideration for the undertaking of O'Brien and Smith. They failed in one or two palpable efforts, as for example, when they brought the water from an outside drain pipe into the cellar and failed effectively to carry it away."

At common law a condition could not be apportioned and if the reversion were severed, neither of the reversioners could take advantage of the condition.

Under the 32 Hen. VIII. c. 34, the assignee of the reversion of part of the land has the same right to sue as the lessor had, and also the same right to take advantage of conditions or covenants which are in their nature divisible, but not of those which are in their nature entire: *Mitchell v. McCauley* (1893) 20 A. R. 272; *Mayor of Swansea v. Thomas* (1882) 10 Q. B. D. 48; *Twyman v. Pickard* (1818) 2 B. & Ald. 105.

An assignee of part of the reversion in the whole land is a person who receives a lesser estate as a term of years out of a reversion in fee, or for life or any

greater interest. Where, for instance, a lessor by indenture makes a second lease in possession, this lessee becomes assignee of the reversion on the first lease: *Harmer v. Bean, supra*; *Holland v. Vanstone* (1867) 27 U. C. R. 15.

Where a second lease is under seal it operates as a lease in possession of all that part of the lands of which the lessor had the possession at the time of the demise, and as a lease of the reversion with the rent incident thereto of that part of the land of which the lessor has not the possession: *Ecclesiastical Com. v. O'Connor* (1858) 9 Ir. C. L. R. 242.

By 22 & 23 Vict. [Imp.] c. 35, s. 3, it is enacted that where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, as if the same had been reserved to him as incident to his part of the reversion.

By R. S. O. 1914 c. 155, s. 5: "Rent reserved by a lease and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained shall be annexed and incident to and shall go with the reversionary estate in the land or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of by any person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Taken from the Conveyancing Act of 1881 [Imp.]: 44-45 Vict. c. 41, s. 10, re-enacted in Saskatchewan (1919) 9 Geo. V. c. 79, s. 4, which added as s. 4 (2):

"In the case of rent reserved and the reversion having been severed, the above section shall apply only where the rent has been legally apportioned."

This section does not apply to a lease not in writing: *Blane v. Francis* [1917] 1 K. B. 252; 86 L. J. (K.B.) 364 [C.A.].

See also *Brown v. Gallagher* (1914) 31 O. L. R. 423, considered at p. 723, *ante*.

By R. S. O. 1914 c. 155, s. 7: "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incidental to and shall go with the reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person to whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, such obligation may be taken advantage of and enforced against any person so entitled."

Taken from the Conveyancing Act of 1881 [Imp.] 44-45 Vict. c. 41, s. 11, re-enacted in Saskatchewan (1910) 9 Geo. V. c. 19, s. 6.

"Subject matter of the lease": see *Barnes v. City of London Real Property Co.* [1918] 2 Ch. 18; 87 L. J. (Ch.) 601.

The R. S. O. c. 155, s. 8, copied from 44-45 Vict. c. 41, s. 12 [Imp.], provides that notwithstanding the severance of the reversion upon a lease or the avoidance of the term as to part only of the land comprised therein, every condition or right of re-entry and every other condition contained in the lease shall be apportioned and remain annexed to the several parts of the reversion. Similar provisions are in force in New Brunswick, C. S. N. B. 1903, c. 153, s. 1; Saskatchewan, 1918-9, 9 Geo. V. c. 79, s. 7, which added s. 7 (2):

"In the case of rent reserved and the reversion having been severed, the above subsection shall apply only where the rent has been legally apportioned."

Severing the reversion upon a lease within the above statutes means conveying to some other person a part of the land: *Reeve v. Thompson* [1887] 14 O. R. 499.

Though the 32 Hen. VIII. c. 34, does not apply to a parol letting, there are cases in which a reversioner may become entitled to the benefit and liable to the obligation of terms identical with those which were contained in a parol lease with the original landlord; but to effect this there must be a new contract supported by its own consideration: per Pollock, B., in *Phillips v. Miller* (1875) L. R. 10 C. P. 420 at 431. Thus in *Buckworth v. Simpson* (1835) 1 C. M. & R. 834, it was held that where there is a tenancy from year to year and either party die or assign, if the then new landlord and tenant allow the time for giving notice to quit to elapse without giving such notice a new relation of landlord and tenant on the same terms arises by implication of law from the situation of the parties: see *Cornish v. Stubbs* (1870) L. R. 5 C. P. 334; *Wyatt v. Cole* (1877) 36 L. T. 613.

But liability on the original covenants can only arise in respect of a new tenancy created between the parties. A lease not under seal prohibited the lessees from assigning without leave, and the lessor covenanted at the expiration of the tenancy to pay for certain things at a valuation. The lessee held over after the expiration of his term, and then by deed assigned his interest and the right to be paid for the things to the plaintiff. It was held that the assignment of the parol tenancy did not give a right of action for the things without the creation of a new tenancy between the parties. There must be some act from which the inference can be drawn that one party has consented to the substitution of the assignee in the place of the other party, upon the same terms as those existing between the original parties themselves: *Elliott v. Johnson* (1866) L. R. 2 Q. B. 120. Whether there was a recognition or adoption of the original contract or a substitution of a new one is a question of fact for a jury: *Smith v. Edington* (1874) L. R. 9 C. P. 145.

A rector made a lease for 21 years and covenanted to pay for improvements. The reversion was assigned to A., who had notice of the terms of the lease, and the lessee paid rent to A. until the end of the term. A. was



held liable to pay for the improvements, though the covenant probably did not run with the land, as assigns were not named. The Court also held that this liability attached whether the lease was valid or invalid. If valid, it bound the rector, who was alive and a party to the action; if invalid, the lessee became tenant from year to year to A. on the terms of the lease: *Hilliard v. Beck* (1889) 9 C. L. T. 90.

The lessee of certain land entered into a covenant to leave some acres sown, to be paid for by the landlord at a valuation upon the termination of the term. A purchaser of the reversion from the landlord treated for the sale of the crops at a valuation and admitted that he was liable for whatever the original lessor was liable, and it was held that he must pay for the crops: *Murton v. Scott* (1858) 7 U. C. C. P. 481.

A lessee, after he had taken possession under his lease, agreed verbally with the lessor to erect at his own expense a roughcast addition to a brick tenement then on the premises, with the privilege of selling or removing such addition. The lessee accordingly built such addition and afterwards transferred his interest to the defendant. The lessor subsequently sold and conveyed the fee to the plaintiff, subject to the lease to the original lessee, "and by him assigned to the defendant," who was then in possession. It was held that the plaintiff was bound not only by the terms of the lease, but took, subject to any other right or equity existing between the original lessor and lessee, including such verbal agreement, to permit the removal of the addition: *Close v. Belmont* (1875) 22 Gr. 317.

Two leases were executed between the same parties and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty. It was a condition of the leases that the lessee should commence digging for oil on or before the 1st of June, 1861, which he failed to do. On the 16th September, 1863, the lessor accepted from the lessee \$50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was indorsed on the twenty-

acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th November, 1864, another memorandum was indorsed on the same lease, and signed by the lessor, agreeing to extend the time for commencing "work on the within lease" until June, 1865. The lessor was not after this time beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part. The reason for giving the ten-acre lease was because of doubt as to title to the whole twenty, but the parties had treated the twenty-acre lease as covering land included in the other. The purchaser had notice of the leases, and, on his subsequently obtaining a patent of the ten acres, the lease of it was held binding on him: *Flower v. Duncan* (1867) 13 Gr. 242.

A lessor executed the following document:

"Orangeville, September 28, 1882.

"In consideration of certain costs, owing by me to G. H. Galbraith . . . I hereby assign and transfer unto the said G. H. Galbraith a certain lease, dated the 10th day of September, 1881, and made by me to John Irving, covering the premises known as the Dufferin House in Orangeville, together with all rent now due, or to accrue due, from the said John Irving or his assigns in respect of said lease and the term thereby created." It was held that as an assignment of the reversion this instrument would be void, not being a deed: *Galbraith v. Irving* (1885) 8 O. R. 751; *Hopkins v. Hopkins* (1884) 3 O. R. 223. But to amount to an assignment of the reversion it is not necessary that the whole estate of the lessor be transferred. Thus, where A. let a house to B., as tenant from year to year, and afterwards granted a lease by deed to C. of the house for twenty-one years, this was held a transfer of the reversion to C., preventing A. from recovering rent from B.: *Harmer v. Bean* (1853) 3 C. & K. 307; *Holland v. Vanstone*, pp. 282 and 720, *supra*.

If an assignee of the reversion, under a conveyance subject to a lease, mortgage the reversion, the mortgagee may sue a mortgagee of the term for rent. S.

having mortgaged certain land in fee, afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold to J., expressly subject to the lease. The latter received a conveyance from S. and P. and the plaintiff, each using apt words ("bargain, sell and release") to convey an estate in fee. On the same day J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action by certificate duly registered, and the plaintiff sued the defendant who was a mortgagee of the term by assignment for rent accrued during the existence of the mortgage. It was held that such reversion passed to the plaintiff by the first conveyance from S., which contained apt words to pass the legal estate, though in it the mortgage was recited, that the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J., and that the plaintiff being still bound by the lease, defendant was so as well, and the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued, and that he was therefore entitled to recover: *Cameron v. Todd* (1863) 22 U. C. R. 390; 2 E. & A. 434.

When there has been an assignment of a reversion, payment of rent to the assignor after the assignment but before it is due and before notice has been given under 4 Anne, c. 16, s. 10 [see p. 1028, *ante*] is not good as against the assignee, who is entitled to all the rent accruing due subsequently to the assignment, provided he gives notice before rent day. "Payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord . . . The receipt of the rent could not be treated here as a discharge by the landlord, because by assigning the reversion before the rent was received by him he had parted with the power to give such a discharge."

Per Willes, J., in *De Nicholls v. Saunders* (1870) L. R. 5 C. P. 589, at 593; *Gilmore v. Roe* (1874) 21 Gr. 284. See *Macfarlane v. Buchanan* (1862) 12 U. C. C. P. 591. A release by the lessor of all rent before the assignment, however, would be good as against the assignee (*De Nicholls v. Saunders, supra*).

What constitutes notice was discussed in *Cook v. Guerra* (1872) L. R. 7 C. P. 132, where it was held that no formal notice was necessary, it being sufficient if from the circumstances the Court could infer that knowledge of the assignment was brought to the mind of the other party.

## APPENDIX A.

*The Ontario Short Forms of Leases Act, R. S. O. 1914, c. 116.*

The history of this Act and the criticisms of it have been discussed at p. 127, *et seq.* [ante].

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as the Short Forms of Leases Act.

2. Where a [lease under seal] made according to the form set forth in Schedule A., or any other such lease expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B., and distinguished by any number therein, such [lease] shall [A] have the same effect [B] as if it contained the form of words contained in column two of Schedule B., distinguished by the same number as is annexed to the form of words used in [such lease]; but it shall not be necessary, in any such [lease] to insert any such number.

[Origin: (1910) 10 Edw. VII. c. 54, s. 2; R. S. O. 1897, c. 125, s. 1; 60 Vict. c. 15, s. 11, schd. A. 24, 25; R. S. O. 1887, c. 106, s. 1, which used the word "deed" in place of the word "lease" or "lease under seal," printed in brackets and had at [A.] the words "be taken to" and at [B] "and be construed." These words appeared until 1910].

### *Similar Legislation.*

England: (1845) 8 & 9 Vict. c. 124. Preamble.

British Columbia: R. S. B. C. 1911, c. 135, s. 3.

Manitoba: R. S. M. 1913, c. 181, s. 2, corresponding to R. S. O. 1887, c. 106, s. 1.

Nova Scotia: (1912) 2 Geo. V., c. 2, s. 3.

Though covenants not in the statutory form may be inserted in a lease made under the Act, yet such covenants must be complete in themselves as they can derive no aid from the statute. Thus a covenant to build a house on the demised premises and to rebuild the same in the event of destruction by fire, when not expressly extended to the assigns of the lessee, is binding on him alone and does not run with the land: *Emmett v. Quinn* (1882) 7 A. R. 306.

A lease made in 1870 purported to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," being the title of the 14 & 15 Vict. c. 8, consolidated in the Con. Stats. U. C. c. 92, the form in the latter statute being "in pursuance of an Act respecting short forms of leases," it was held that the lease came within the Act, for it referred thereto: *Davis v. Pitchers* (1874) 24 U. C. C. P. 516.

A lease dated August 1st, 1888, for five years, was made "in pursuance of the Act respecting short forms of leases," instead of "indentures," as required by the R. S. M. c. 141, s. 2, third sched.; it was held that the statute was sufficiently referred to to give the benefit of the full covenants in the schedule, column two, the short summary in column one being used: *Shore v. Green* (1890) 6 M. R. 322; 1 W. L. T. 7.

A lease dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements," this being the title of the original Act, which was varied by consolidation, and was at the date

of the lease contained in Con. Stats. U. C. c. 92, as "an Act respecting short forms of leases." It was held that the title was no part of the statute, and that the reference thereto was sufficient: *Lee v. Lorsch* (1876) 37 U. C. R. 262.

3. (1) Parties who use any of the forms in the first column of Schedule B. may substitute for the words "lessee" or "lessor" any name or other designation, and in every such case a corresponding substitution shall be taken to be made in the corresponding form in the second column.

[Origin: (1910) 10 Edw. VII. c. 54, s. 3 (1); R. S. O. 1897, c. 125, sched. B. (1); R. S. O. 1887, c. 106, sched. B. (1)].

*Similar Legislation.*

England: s. 2 (1).

British Columbia: sched. 2 (1).

Manitoba: s. 7.

3. (2) Such parties may substitute the feminine gender for the masculine, or the plural number for the singular in the forms in the first column and corresponding changes shall be taken to be made in the corresponding forms in the second column.

[Origin: (1910) 10 Edw. VII. c. 54, s. 3 (2); R. S. O. 1897, c. 125, sched. B (2); R. S. O. 1887, sched. B (2).]

*Similar Legislation.*

England: s. 2 (2).

British Columbia: sched. 2 (2).

Manitoba: s. 8.

3. (3) Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

[Origin: (1910) 10 Edw. VII. c. 54, s. 3 (3); R. S. O. 1897, c. 125, sched. B. (3); R. S. O. 1887, c. 106, sched. B. (3)].

*Similar Legislation.*

England: s. 2 (4).

British Columbia: sched. 2 (4).

Manitoba: s. 9.

See *Crozier v. Tabb*, noted at p. 1114, *post*; *Delamatter v. Brown Bros.*, noted at p. 1103, *post*.

3. (4) Where the premises demised are of freehold tenure. the covenants 2 to 9 shall be taken to be made with, and the proviso 12 to apply to the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, such covenants and proviso shall be taken to be made with, and apply to the lessor, his executors, administrators and assigns.

[Origin: (1910) 10 Edw. VII., c. 54, s. 3 (4); R. S. O. 1897, c. 125, sched. B. (4); R. S. O. 1887, c. 106, sched. B. (4)].

*Similar Legislation.*

England: s. 2 (4) (5) [part].

British Columbia: s. 2 (4) (5) [part].

Manitoba: s. 11.

3. (5) Where the word "lessor" occurs in the second column it shall, when the premises demised are of freehold tenure, include the heirs, executors, administrators and assigns of the lessor, and when the premises demised are of leasehold tenure it shall include the executors, administrators and assigns of the lessor, and where the word "lessee" occurs in the second column it shall include the executors, administrators and assigns of the lessee.

[Origin: (1910) 10 Edw. VII., c. 54, s. 3 (5); R. S. O. 1897, c. 125, sched. B. 5].

4. Any lease or part of a lease which fails to take effect by virtue of this Act shall nevertheless be as effectual to bind the parties thereto as if this Act had not been passed.

[Origin: (1910) 10 Edw. VII., c. 54, s. 4; R. S. O. 1897, c. 125, s. 2; R. S. O. 1887, c. 106, s. 2].

*Similar Legislation.*

England: s. 4.

British Columbia: s. 6.

Manitoba: s. 3.

These Acts correspond to the R. S. O. 1897.

Nova Scotia: s. 6.

Where a lease purports to be made under these Acts if any covenant fails to operate thereunder it nevertheless takes effect as a covenant so far as its own words extend: *Lee v. Lorsch* (1876) 37 U. C. R. 262; *Emmett v. Quinn* (1882) 7 A. R. 306.

5. Unless the contrary is expressly stated in the lease, all covenants not to assign or sublet without leave entered into by a lessee in any lease under this Act shall run with the land demised, and shall bind the executors, administrators, and assigns of the lessee whether mentioned in the lease or not, unless it is by the terms of the lease otherwise expressly provided, and the proviso for re-entry contained in Schedule B. shall, when inserted in a lease, apply to a breach of either an affirmative or negative covenant.

[Origin: (1910) 10 Edw. VII. c. 54, s. 5; R. S. O. 1897, c. 125, s. 3; R. S. O. 1887, c. 106, s. 4].

See the Nova Scotia Act, s. 4.

The first part of this section was passed [see *Munro v. Waller* (1896) 28 O. R. 29, per Rose, J., at p. 31], as a consequence of the decision in *Crawford v. Bugg* (1886) 12 O. R. 8, where it was held that the covenant did not include assigns. The clause added in 1886 by 49 Vict. c. 21, read:

"5. Unless the contrary is expressly stated in the lease in all leases made after the 25th day of March, 1886, the extended form of covenant numbered 7 [now 8, p. 1109. *post*], shall be read as containing after the word 'lessee' in the first line thereof the words 'his executors, administrators and assigns.'"

The second part as to proviso for re-entry [see p. 1114, *post*] gives statutory recognition to the decision in *Toronto Hospital Trustees v. Denham* (1880) 31 U. C. C. P. 207.

The Ontario Act formerly provided that:

"3. Every deed, unless an exception is specially made therein, shall be held and construed to include all out-houses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passageways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in any wise appertaining."

#### *Similar Legislation.*

England: s. 2.

British Columbia: s. 4.

Manitoba: s. 4.

The section does not now appear in the Ontario Act, the provision noted at p. 134, *ante*, taking its place.

#### SCHEDULE A.

##### *Form of Lease.*

This indenture, made the                      day of                      , one thousand nine hundred and                      , in pursuance of The Short Forms of Leases Act, between                      , of the first part, and                      , of the second part, Witnesseth, that in consideration of the rents, covenants and agreements, hereinafter reserved and contained on the part of the lessee the lessor doth demise and lease unto the lessee, his executors, administrators and assigns, all that (here insert a description of the premises with sufficient certainty).

To have and to hold the said demised premises for and during the term of                      , to be computed from the                      day of                      , one thousand nine hundred and                      , and from thenceforth next ensuing and fully to be complete and ended.

Yielding and paying therefor yearly and every year during the said term unto the said lessor his (or their) heirs, executors, administrators or assigns, the sum of                      , to be payable on the following days and times, that is to say (on, etc.), the first of such payments to become due and be made on the                      day of                      next, (*here insert covenants or any other provisions*).

In witness whereof, etc.

Compare the forms given in the Land Titles Acts of Alberta, Saskatchewan and Manitoba.

The Manitoba form is as follows:

#### SCHEDULE C.—(SECTION 101).

##### MEMORANDUM OF LEASE.

I, A B., of                      being registered as owner, subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten (*or endorsed hereon*), of that land described as follows:

do hereby lease to E. F., of                      all the said land, to be held by him, the said E. F., as tenant for the space of                      years



from (*state here the date and term*) at the yearly rental of dollars, payable (*here insert terms of payment of rent*), subject to the covenants and powers implied (*also set forth any special covenants or modifications of implied covenants*).

In witness whereof I have hereunto signed my name this day of

Signed in presence of

#### SCHEDULE B.—(OF THE ONTARIO ACT).

1. The said *lessee*      1. And the said lessee doth hereby [A] covenants with the said ant with the said lessor in manner following, that is to say:

[Origin: 10 Edw. VII. c. 54, sched. B. 1; R. S. O. 1897, sched. B. (1) (part); had at [A] the words for "himself, his heirs, executors, administrators and assigns": R. S. O. 1887, sched. B. 1 (part)].

See the provisions of s. 3 (4) page 1098, *ante*, and *Lee v. Lorsch* (1876) 37 U. C. R. 262.

2. To pay rent.

2. That he, the said lessee, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

[Origin: 10 Edw. VII. c. 54, sched. B (2); R. S. O. 1897, sched. B (1) (part); R. S. O. 1887, sched. B (1) (part)].

#### *Similar Legislation.*

England: sched. 1.

British Columbia: sched. 1.

Manitoba: sched. 3 (1).

The Manitoba Act adds:—

(a) Provided that, in the event of the said demised premises being destroyed by fire or tempest, or the act of God, during the said term, or not being totally destroyed but to such an extent as to render the same unfit for occupation, the said lessee, his or her heirs, executors, administrators and assigns, may, at any time within ten days after such destruction or injury to said premises, give notice to the lessor requiring the said premises to be repaired and put in such condition as may be necessary to render them suitable for occupation for the purposes for which they have been leased, and with such notice shall serve a certificate of an architect as to the time within which such premises could be so repaired; and the lessor shall, within three days, give notice to the lessee that he intends so to repair; and upon failure to so repair within such time as may be so certified to by such architect as reasonably sufficient to make the necessary repairs, the said lease shall then determine;

(b) Provided, further, that, if the lessor do not so give notice within such three days, the lessee may either surrender the said premises or repair the same and charge it against the rent thereafter to be paid.

And the said lessor may at any time within ten days after the destruction or accident to the said premises as aforesaid, give notice to the lessee that it is not his intention to repair said premises, whereupon the said lessee may either surrender the said premises or repair the same and charge it against the rent to be thereafter paid;

(c) Provided, always, that in case the tenant surrender said premises under either of these conditions, rent shall cease to be payable after such damage or destruction as aforesaid;

(d) Provided, further, and it is expressly understood by and between the parties hereto that the said lessee, his executors, administrators and assigns shall not be bound to repair, where the same may be necessary from reasonable wear and tear, or the damage be caused by fire, tempest or the act of God.

Nova Scotia: sched. E. (1).

Compare the implied covenants under the Alberta, Manitoba and Saskatchewan Acts referred to at p. 162, *ante*.

The Manitoba clauses should be compared with clause 11, p. 1113 [*post*].

This covenant must be read in the light of s. 3 (4) p. 1098 (*ante*).

The covenant to pay without any deduction raises the question dealt with under the following covenant to pay taxes.

3. And to pay taxes [except for local improvements].

3. And also will pay all taxes, rates, duties, and assessments whatsoever, whether municipal, parliamentary, or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof [except municipal taxes for local improvements or works assessed upon the property benefited thereby].

[Origin: 10 Edw. VII. c. 54, sched. B (3). R. S. O. 1897, sched. B. 2; R. S. O. 1887, sched. B (2), which had not the words in brackets; these were added by (1901) 1 Edw. VII. c. 12, s. 27].

#### *Similar Legislation.*

English: sched. (2).

British Columbia: sched. (2).

Manitoba: sched. 3 (2).

These sections have not the words in brackets above.

Nova Scotia: sched. E. (2).

This covenant must be read with s. 3 (4), p. 1098, [*ante*].

Reference should be made to the provisions of the Landlord and Tenants Act (Ontario), R. S. O. 1914, c. 155, s. 27 (1), and Saskatchewan (1919) 9 Geo. V. c. 79, s. 17, noted at p. 271, *ante*.

By R. S. O. 1914, c. 155, s. 27 (2), in the case of a lease under the Act, "where the words 'except for local improvements' are struck out or omitted from the covenant . . . such striking out or omission shall be deemed to be a specific provision otherwise made within the meaning of s. 27, ss. 1." This provision was not copied in Saskatchewan.

Before the words in brackets were added to the Ontario Act it was held that under the statutory formula the lessee was liable for local improvement taxes and for the additions made under the Assessment Act year by year, to the amount of the taxes in arrear or additions made by the municipality: *Boulton v. Blake* (1886) 12 O. R. 532. The covenant covers a special rate created by a corporation by-law as well as all other taxes: *In re Michie and City of Toronto* (1861) 11 U. C. C. P. 379.

*Exceptions.*

Reference should be made to the dictum of Mer-dith, C.J., in *Delamatter v. Brown Brothers Co.* (1905) 9 O. L. R. 351, at p. 356, where he said that he could understand that to add to this covenant such words as "except the taxes for the current year" would be to "introduce into or annex to the respective covenants an express exception from or express qualification of them, for the addition of such words introduces an exception to the generality of the words of the short form as well as of the corresponding long form and a qualification of that generality." [See s. 3 (3), p. 1098, *ante*].

A lessee covenanted to pay during the term "all taxes, rates, assessments, . . . whatsoever, whether parliamentary, municipal or otherwise, which now are, or which during the continuance of the said term shall at any time be rated, charged, assessed or imposed in respect of the said premises," with a proviso for re-entry on breach. Taxes were assessed and charged against the lessor on 15th April, 1872, before the tenancy commenced, but of this the lessee was not aware, and the lessor attempted to forfeit the lease for non-payment of these taxes; but the Court held that the lessee was not liable for the taxes for 1872, which had been assessed against the lessor, for that the words "all rates, etc., which now are," referred to the kind or character of the tax assessable against the land, and the words "or which shall at any time, etc.," to any other kind of taxes which might thereafter be imposed: *Macnaughton v. Wigg* (1874) 35 U. C. R. 111: and see *Heyden v. Castle* (1888), 15 O. R. 257, noted at p. 272, *ante*.

In (1915) 35 C. L. T. 208, Mr. Lewis Duncan discusses the effect of the covenant [B 2] to pay rent without any deduction whatsoever upon this covenant. He considers *Cranston v. Clarke* (1753) Savers 78; *Bradbury v. Wright* (1781) 2 Doug. 624; *Bennett v. Womack* (1828) 7 B. & C. 627; *Grantham v. Elliott* (1842) 6 U. C. Q. B. O. S. 192, already discussed at p. 311 (*ante*)—and *Parish v. Sleeman* (1859) 1 Giff. 238, and (1860) 1 DeG. F. & J. 326, and sums up in the manner quoted at p. 311 (*ante*). He then continues, 35 C. L. T. at p. 212: "It might be asked whether in such a case the explicit covenant serves any useful purpose. One answer to this is that it is a redundancy due possibly to over caution, which is still found in the best English Forms. . . . It is obvious that the draftsman of the Short Forms of Leases Act never had in mind and never provided for those cases in which the parties would wish to delete the covenant to pay taxes. With the full form before him, knowing that both phrase and clause should be struck out if the agreement is that the landlord should bear the taxes, the position of the solicitor is simple. If the covenant to pay taxes is struck out there remains the covenant to pay "without any deduction."

Compare the implied covenants, noted at p. 162, *ante*.

The general subject of covenants to pay taxes is dealt with at pp. 269, *et seq.* (*ante*.)

|  |   |
|--|---|
| <p>4. And to repair, [reasonable wear and tear and damage by fire, lightning and tempest only excepted].</p> | <p>4. And also will, during the said term, well and sufficiently repair, maintain, [A] amend and keep the said demised premises with the appurtenances in good and substantial repair [B]. and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made by the lessor when, where, and so often as need shall be [reasonable wear and tear and damage by fire, lightning and tempest only, excepted].</p> |
|--|---|

[10 Edw. VII. c. 54, sched. B. (4) ; R. S. O. 1897, sched. B. (3) ; R. S. O. 1887, sched. B (3), had not the words in brackets; they were added in 1897 by 60 Vict. cap. 16, sched. A (25), nor the words printed in italics; they were added by 58 Vict. c. 26, s. 2 (1) (a).

*Similar Legislation.*

England: Sched. 3 had at [A] the words "pave, empty, cleanse," and at [B] "together with all chimney pieces, windows, doors, fastenings, water closets, cisterns, partitions, etc."

British Columbia: sched. 3 corresponds to the English Act.

Manitoba: sched. 3 (3) adds these provisions:

(a) Provided that, in the event of the said demised premises being destroyed by fire, tempest or the act of God, or during the said term, or not being totally destroyed but to such an extent as to render the same unfit for occupation, the said lessee, his or her heirs, executors, administrators and assigns, may, at any time within ten days after such destruction or injury to said premises, give notice to the lessor requiring the said premises to be repaired and put in such condition as may be necessary to render them suitable for occupation for the purposes for which they have been leased; and with such notice shall serve a certificate of an architect as to the time within which such premises could be so repaired; and the lessor shall, within three days, give notice to the lessee that he intends so to repair, and upon failure to so repair within such time as may be so certified to by such architect as reasonably sufficient to make the necessary repairs, the said lease shall then determine;

(b) Provided, further, that, if the lessor do not so give notice within such three days the lessee may either surrender the said premises or repair the same and charge it against the rent thereafter to be paid.

And the said lessor may at any time within ten days after the destruction or accident to the said premises as aforesaid, give notice to the lessee that it is not his intention to repair the said premises, whereupon the said lessee may either surrender the said premises or repair the same, and charge it against the rent to be thereafter paid;

(c) Provided, always, that, in case the tenant surrender said premises under either of these conditions, rent shall cease to be payable after such damage or destruction as aforesaid;

(d) Provided, further, and it is expressly understood by and between the parties hereto, that the said lessee, his executors, administrators and assigns, shall not be bound to repair where the same may be necessary from reasonable wear and tear, or the damage is caused by fire, tempest or the act of God.

Compare this with Clause 11, at p. 1113, *post*.

Nova Scotia: sched. E. (3).

This covenant must be read with s. 3 (4), p. 1098, *ante*.

This covenant and that in B. 7 are qualified by the exception contained in Covenant B. 9, *Emmett v. Quinn* (1882) 7 A. R. 306 [C. A.]. See the notes to B. 9.

"The covenant to repair is a continuing covenant, and each day that there is a state of non-repair, constituting a breach of the covenant, there is a right of entry and a right to forfeit the lease": Middleton. J., in *Holman v. Knox* (1912) 25 O. L. R. 588, at p. 629; 3 O. W. N. 745; 21 O. W. R. 325 [Div. Ct.]. See 20 O. W. R. 121; 3 O. W. N. 151 [Sutherland, J.]. not following *Holderness v. Lang* (1886) 11 O. R. 1.

The right of re-entry is provided by Clause B 12. See p. 1114, *post*.

*Reasonable Wear and Tear.*

The meaning of this exception is discussed at p. 633, *ante*.

*The Covenant to Repair on Notice.*

This covenant is contained in B. 7.

The breaking of a doorway in a brick wall is a breach of the statutory covenant to repair, but where a lessee has entered into the statutory covenant, converting a flat window into a bow window, or putting glass into the panel of a door, or a door where there was a window, or to make a door to open at the right hand in place of the left hand, or to divide a door into two parts in place of being all in one, or to shift a staircase from one part to another, would not be a breach of the covenant if they were acts of improvement and beneficial to the estate: *Holderness v. Lang* (1886) 11 O. R. 19, per Wilson, C.J.

Under the statutory covenant to repair, it had been held that the tenant had the right to put up fixtures, and was bound to keep in repair, not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make under the covenant: *Holderness v. Lang* (*supra*).

The amendment introduced by the 58 Vict. c. 26 [and now appearing as Clause 10, *post*], makes it clear that the tenant's liability to repair extends only to landlords' and not to tenants' fixtures: see *Argles v. McMath*, considered at p. 1111, *post*. The case of *Holderness v. Lang* (*supra*), in so far as it relates to the tenant's obligation to repair fixtures, seems to be now inapplicable.

Under the statutory covenant the lessor has no right to enter to put up fixtures, and thus to increase, without express authority for that purpose, the burdens of the tenant in respect of the obligation of the latter to keep the fixtures in repairs: *Holderness v. Lang* (*supra*).

Independently of a statute, or some special clause relieving him, the lessee would continue liable for the rent: see p. 285, *ante*, Article 41.

Fixtures: see *Cronkhite v. Imperial Bank*, considered at p. 1113, *post*. Compare the implied covenants at p. 162, *ante*.

The general subject of covenants to repair is discussed under Article 102, pp. 630 *et seq.*, *ante*.

5. And to keep up fences.

5. And also will, from time to time, during the said term, keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new-made in a good and husband-like manner and at proper seasons of the year.

[Origin: (1910) 10 Edw. VII. c. 54, sched. B. (5); R. S. O. 1897, sched. B. (4). R. S. O. 1887, sched. B. (4)].

*Similar Legislation.*

Alberta Form L. (2) [see p. 1117, *post*], contains a covenant to fence where no substantial fence exists.

England: none.

British Columbia: sched. 4.

Manitoba: sched. 3 (4).

Nova Scotia: sched. E. (4).

Saskatchewan: Form O. (3), corresponds to the Alberta Form.

See p. 638, *ante*, as to the exceptions which may be made.

In the dictum of Meredith, C.J., in *Delamatter v. Brown Brothers Co.*, quoted at length at p. 1103, *ante*, he says the addition of "such words as except line and road fences" would be a proper exception.

This covenant must be read with s. 3 (4), p. 1098, [*ante*].

It seems that this covenant only extends to fences on the demised premises: *Houston v. McLaren* (1888) 14 A. R. 107.

See, generally, p. 638, [*ante*].

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| <p>6. And not to cut<br/>down timber.</p> | <p>6. And also will not at any time during the said term hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees except for necessary repairs or firewood, or for the purpose of clearance as herein set forth.</p> |
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[Origin: (1910) 10 Edw. VII. c. 54, sched. B 6; R. S. O. 1897, sched. B 5; R. S. O. 1887, sched. B 5.]

This covenant must be read with s. 3 (4), p. 1098, [*ante*].

#### *Similar Legislation.*

Alberta: Form L. (4) contains no exceptions.

England: none.

British Columbia: sched. 5.

Manitoba: sched. 3 (5).

Nova Scotia, sched. E. (5).

Saskatchewan: Form O. (5) corresponds to the Alberta form.

*Smellie v. Watson* (1904) 7 O. L. R. 635; 2 O. W. R. 118; 3 O. W. R. 475 [C. A.], was the case of a lease in which this covenant was restricted by an express covenant which provided that the lessee was not to cut down timber for any purpose but firewood, but was to have the privilege of using for any purpose all the lying down hardwood timber, cedar only excepted. The Court held that although the statutory covenant—under which the lessee might also cut down trees for necessary repairs as well as firewood—was restricted, the common law right to use lying down *dead* timber was extended to lying down hardwood timber, sound or unsound, except cedar.

The form prohibits the lessee from cutting timber or timber trees except for necessary repairs or firewood, or for the purpose of clearance. There is no further reference to clearing land contained in the form, but it would seem this clause is sufficient to justify the lessee in cutting timber for that purpose; though, of course, the lease may contain special provisions in regard to cutting timber: *Cook v. Edwards* (1885) 10 O. R. 341; or may prevent the lessee from doing so: *Goulin v. Caldwell* (1867) 13 Gr. 493; or may allow the lessor to enter for that purpose: *Chestnut v. Day* (1838) 6 O. S. 637; *Campbell v. Shields* (1879) 44 U. C. R. 449.

In *McPherson v. Giles* (1919) 45 O. L. R. 441; 16 O. W. N. 183, the third claim was for breach of the covenant "not to cut down timber." The lease purported to be made under the Act. The defendant did in fact cut down, in the centre of the bush, 51 trees, 48 of which were timber trees, for firewood. The plaintiff never gave the defendant leave to cut the timber, but simply obtained leave for himself to take some wood off the place for

his own use. The cutting was reckless and negligent, and depreciated the value of the reversion at the expiration of the lease by at least \$350. Clute, J., said, at p. 444:

"The exception includes 'repairs' or 'firewood' or 'clearance,' and the words 'herein set forth' evidently have reference to the exception. A somewhat similar case is referred to in Craies' Statute Law, 2nd ed., p. 549 (appendix A.); *In re Cambrian R. W. Co.* (1868) L. R. 3 Ch. 297, where the words 'hereinbefore contained' were held to be ambiguous, and might mean 'before contained in this Act,' or 'before contained in this section,' and which of the two meanings is the proper one must be discovered 'from the context and the general scheme of the Act.' The fact that there is a comma after the word 'firewood' and none after the word 'clearance' is not conclusive as to the construction to be placed upon it. In *Stephenson v. Taylor* (1861) 1 B. & S. 101, 106, Cockburn, C.J., said: 'On the Parliament Roll there is no punctuation, and we, therefore, are not bound by that in the printed copies.' Craies' Statute Law, 2nd ed., p. 198. See also *Duke of Devonshire v. O'Connor* (1890) 24 Q. B. D. 468, which turned on the construction of an enclosure Act. In that case it was a question of the effect of brackets. Lord Esher, M.R., said: 'To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops.' Craies, p. 198, says: 'It does not appear that any definite rule can be laid down as to this; but, as Dwarris says as to this point (2nd ed., p. 601), 'the intention must be collected from the context to which the words relate,' and refers to a number of cases to illustrate this. While inclined to the view that the statute in the present case does not introduce an exception, from the fact that nothing is set forth in the lease shewing what timber trees may be cut for repairs, firewood, and clearance, in the view I take it is unnecessary to decide this point. In my view, the defendant cannot justify his acts in the cutting of this timber under the exception in the covenant. They were wholly unnecessary and unauthorized either verbally or within the terms of the lease: he did not suppose he had the right to cut down any timber; and I find that it was not part of the agreement between the parties that the defendant might cut any timber or other trees in that portion of the woods known as the sugar bush; and, if necessary, the lease should be reformed in that respect. There was plenty of fallen and standing dead timber from which he could have supplied himself with all the firewood required by him; even had there been a shortage in that respect, there was green timber in the slashed-over portion more than sufficient for his purpose. Having regard to the condition of the bush, underbrushed and obviously kept as a sugar bush, it is difficult for me to understand his act as being other than wilfully destructive. Assuming that he is honest in his statement that he believed that he had verbal authority to do as he did, I think it clear that he had no such authority, express or implied. The authorities bearing upon the question of waste are very fully collected in *Campbell v. Shields* (1879) 44 U. C. R. 449, and *Drake v. Wigle* (1874) 24 U. C. C. P. 405. In the *Campbell Case* there was a covenant as follows: 'The said lessor is hereby allowed to enter upon said demised premises at any time, and to cut and remove any or all timber he may wish.' The lease also professed to be made under the Short Forms Act, with a covenant 'not to cut down timber.' Hagarty, C.J., thought that there was not much practical difference between the actual words used in this lease and the expanded covenant in the statutable form. It was held a question for the jury whether the tapping of trees for sugar-making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and, if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be

broken by such tapping. Whatever does lasting damage to the freehold is waste: *Phillips v. Smith* (1845) 14 M. & W. 589. It would seem that in gross cases vindictive damages may be given, but in general the measure of damage is the diminution in the value of the reversion, less an allowance for immediate payment: *Whitham v. Kershaw* (1885) 16 Q. B. D. 613; see Fawcett's *Landlord and Tenant*, 3rd ed., pp. 348, 349 and 377. 'Waste' is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments to the disherison of him in remainder or reversion, etc., or to the prejudice of the heir or reversioner: 1 Co. Litt. 53: 'per Hagarty, C.J., in the *Drake case*, 24 U. C. C. P., at p. 413. 'There is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burdens upon it, or, thirdly, by impairing the evidence of title:' notes to *Greene v. Cole* (1671) 2 Saund. 228, Wms. Saund., ed. 1871, vol. 2, p. 651, referred to by Hagarty, C. J., in the *Drake Case* (p. 413). He also refers (at p. 417) to *Taylor v. Taylor* (1831), not reported, Rob. & Har. Dig., tit. 'Waste,' p. 448, to the effect that an action of waste might be brought under 6 Edw. I. c. 5; 'and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber.' After referring to numerous authorities, Hagarty, C.J., in the *Drake Case*, at p. 419, says: 'It seems to me on all the authorities that 'waste' is a flexible term varying with local and other circumstances; that its essence is injury to the reversion; and that, if there be no damage thereto, especially in the action on the case for waste, there can be no recovery.' The covenant is broken if more timber is cut than is sufficient for the required purposes. In the present case it appeared that a large number of the timber trees were cut and lay upon the ground, and were not used for firewood. There was no evidence given in respect to this point, but it would seem that more was cut than was necessary for the purpose: see *McMullen v. Vannatto* (1894) 24 O.R. 625."

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| <p>7. And that the said (lessor) may enter and his agents, at all reasonable times during the and view state of repair, said term, to enter the said demised premises [A] and that the said (lessee) will repair according to notice [in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted].</p> | <p>7. And that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises [A] to examine the condition thereof; and further, that all want of reparation that upon such view notice in writing shall be left at the premises, the said lessee will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly [reasonable wear and tear and damage by fire, lightning and tempest only excepted].</p> |
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[Origin: (1910) 10 Edw. VII. c. 54, sched. B 7; R. S. O. 1897, sched. B 6; R. S. O. 1887, sched. B 6, had not the words in brackets, which were added in 1897 by 60 Vict. c. 15, Sch. A (25).]

#### Similar Legislation.

England: sched. 7 had at [A] the words "to take a schedule of the fixtures and things made and erected thereon."

Alberta: see the implied power [p. 162, ante].

British Columbia: sched. 9.

Manitoba: sched. 3 (6) (and see the implied power [p. 162, ante]), provides (a) Provided that, in the event of the said demised premises being destroyed by fire, or tempest, or the act of God, during the said term, or



not being totally destroyed, but to such an extent as to render the same unfit for occupation, the said lessee, his or her heirs, executors, administrators and assigns, may, at any time within ten days after such destruction or injury to said premises, give notice to the lessor requiring the said premises to be repaired and put in such condition as may be necessary to render them suitable for occupation for the purposes for which they have been leased; and with such notice shall serve a certificate of an architect as to the time within which such premises could be so repaired; and the lessor shall, within three days, give notice to the lessee that he intends so to repair, and upon failure to so repair within such time as may be so certified to by such architect as reasonably sufficient to make the necessary repairs, the said lease shall then determine;

(b) Provided, further, that, if the lessor do not so give notice within such three days, the lessee may either surrender the said premises or repair the same and charge it against the rent thereafter to be paid;

And the said lessor may at any time within ten days after the destruction or accident to the said premises as aforesaid, give notice to the lessee that it is not his intention to repair the said premises, whereupon the said lessee may either surrender the said premises or repair the same and charge it against the rent to be thereafter paid;

(c) Provided, always, that in case the tenant surrender said premises under either of these conditions, rent shall cease to be payable after such damage or destruction as aforesaid;

(d) Provided, further, and it is expressly understood by and between the parties hereto, that the said lessee, his executors, administrators and assigns, shall not be bound to repair, where the same may be necessary from reasonable wear and tear or the damage is caused by fire, tempest or the act of God.

This covenant must be read with s. 3 (4), p. 1098 [ante].

This covenant and that in B 4 are qualified by the exception contained in covenant B (9): *Emmett v. Quinn* (1882) 7 A. R. 306 [C.A.]. See the notes to B (9).

See *Holman v. Knox* (1911) 25 O. L. R. 588 [Div. Ct.], noted at p. 762 ante, and *Morris v. Cairncross* (1907) 14 O. L. R. 544, at p. 627, ante.

8. And will not assign or sublet without leave.

8. And also that the lessee shall not, nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over [or sublet] unto any person or persons whomsoever without the consent in writing of the lessor, first had and obtained.

[Origin: (1910) 10 Edw. VII. c. 54, sched. B. 8; R. S. O. 1897, c. 125, sched. B. 7; R. S. O. 1887, c. 106, sched B. 7].

#### Similar Legislation.

Alberta: Form L (1).

England: sched. 9 has not the words in brackets.

British Columbia: s. 11 and 12.

Manitoba: s. 7.

Nova Scotia: sched. E 7.

Saskatchewan: Form O (2) corresponds with the Alberta Form.

This section must be read with s. 5, p. 1105, ante.

The provisions of the Landlord and Tenant Act, R. S. O. 1914, c. 155, s. 23, noted at p. 1051, *ante*, are applicable.

This covenant must be read with s. 3 (4), p. 1098 [*ante*].

Assigning or sub-letting without obtaining the license or consent is a breach of this covenant: *Von Serbinoff v. McCarthy* (1913) 26 W. L. R. 54; 5 W. W. R. 659 [Sask., Johnston, J.]; *McMahon v. Coyle* (1903) 5 O. L. R. 618; 23 Occ. N. 225; 2 O. W. R. 265 (Boyd, C.).

The words "any person or persons" include the original lessee and a re-assignment to him without consent by a lessee to whom he has previously assigned with consent, is a breach of the covenant: *Varley v. Coppard* (1872) L. R. 7 C. P. 505, followed, and *Corporation of Bristol v. Westcott* (1879) 12 Ch. D. 461, referred to: *Munro et al. v. Waller* (1896) 28 O. R. 29; 16 Occ. N. 347 [Div. Ct.—Street, J.].

Where partners have covenanted not to assign without consent, an assignment by one of them of his interest in the lease to his co-partner without such consent is a breach of the covenant: *Loveless v. Fitzgerald* (1909) 42 S. C. R. 254, affirming the same case (*sub nom.*), *Fitzgerald v. Barbour* (1908) 17 O. L. R. 254 [C.A. — Meredith, C.J.], following *Varley v. Coppard* in preference to *Corporation of Bristol v. Westcott* (*supra*), and approving *Munro et al. v. Waller* (*supra*).

A lease in the statutory form contained the usual condition for re-entry on assigning or sub-letting without leave and also a covenant for renewal. The lessee sub-let and the sub-lease contained a covenant to renew for the term to be granted on the renewal of the superior lease, less one month. The lessors assented to this sub-lease. The lessee then assigned his reversion expectant on the sub-lease without leave, and it was held that the lessors might re-enter as against the sub-tenant, notwithstanding their assent, for it must be deemed to be an assent to the renewal of the sub-lease, provided that the superior lease was renewed: *Baldwin v. Wanzer* (1892) 22 O. R. 612. A lessee under a lease made pursuant to the R. S. O. c. 106, created a number of sub-tenancies on part of the land with leave. He then assigned all the rent to an assignee. The head lessors assented to the assignment and covenanted with the assignee that so long as the rents reserved were paid and the covenants observed, they would not claim any forfeiture as to the lands affected by the assignment, and that the rights of the assignee should not be prejudiced by any act of the original lessee or any person claiming under him, or by any breach or non-observance by the lessee or any person claiming under him, of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and sub-letting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises after the interest of the assignee of the rents had expired by lapse of time, and the Court held that in the absence of notice of the assignment without leave pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action: *Baldwin v. Wanzer* (1892) 22 O. R. 612.

Where a lease was executed in pursuance of the Act by the attorney of the lessor, it was held, that the consent to sub-let required, by the extended form of the covenant not to sub-let without leave, to be signed by the lessor was binding on the latter if signed by his attorney: *Brown v. Toothills* (1914) 29 W. L. R. 729; 7 W. W. R. 318; 20 D. L. R. 584 [Man.—Metcalf, J.].

The question of assignment without leave is discussed under Articles 139 and 140, and forfeiture for breach of this covenant at pp. 713 *et seq.*, *ante*.

9. And that he will leave the premises in good repair [reasonable wear and tear and damage by fire, lightning and tempest only excepted].

9. And further, that the lessee will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all the buildings, erections and fixtures [A] *erected or made by the lessor* thereon, in good and substantial repair and condition, [reasonable wear and tear and damage by fire, lightning *and tempest* [B] only excepted.]

[Origin: 10 Edw. VII. c. 54, B 9; R. S. O. 1897, c. 125, B 8; (1897) 60 Vict. c. 15, Sch. A (25), which added the word "lightning" and the words in brackets in Column I.; (1895) 58 Vict. c. 26, s. 2 (c), which added the words printed in italics: R. S. O. 1887, c. 106, B 8].

#### Similar Legislation.

England: sched 10 has at [A] the words "now or hereafter to be built or erected thereon."

British Columbia: sched. 13.

Manitoba: sched. 3 (8), has not the word "lightning," but has at [B] the words "or the act of God."

Nova Scotia: sched. E (8).

The words in brackets appear only in the Ontario and Nova Scotia Acts.

The covenant must be read with s. 3 (4), p. 1098 [*ante*].

The words printed in italics were added as a result of the decision of Boyd, C., in *Argles v. McMath*. He held that under the Short Forms lease in question, the tenant was bound to yield up his trade fixtures which otherwise he would have been entitled to remove, and might only remove chattels which had never become fixtures. He followed the cases discussed at p. 864 (*ante*). The amendment was made and the proviso now contained in the Act printed at p. 1112, *post*, was added.

Shortly afterwards a Divisional Court reversed this decision. See (1894) 26 O. R. 224; 15 Occ. N. 85, and 31 C. L. J. 210, and the Court of Appeal affirmed the Divisional Court (1896) 23 A. R. 44.

The question is discussed by E. D. Armour, K.C., in (1894) 14 C. L. T. 301 and (1895) 15 C. L. T. 216.

#### Variations in Column Two.

England: Applies only to "damage by fire only," as does the British Columbia Act.

Manitoba: Applies to "damage by fire, tempest or the act of God."

Ontario: This and the Nova Scotia Act are the only statutes which require delivery up of the "buildings, erections and fixtures of the lessor" only—and see the notes to sched. B 10, p. 1112.

In *Delamatter v. Brown Brothers Co.* (1905) 9 O. L. R. 351; 5 O. W. R. 423 [D.C.], the statutory short form then read "and that he will leave the premises in good repair." To these words the parties added the words "ordinary wear and tear only excepted," so that in the extended form these latter words immediately followed the words "reasonable wear and tear and damage by fire only excepted," as the clause then read. The Court held, Magee, J., dissenting, that clause 3 (3)—set out at p. 1098, *ante*

—was not intended to authorize the introduction or annexation of words designed to enlarge the operation of the covenant to which they are attached: that the words so added took the whole covenant out of the operation of the Act; that the words had to be read in their ordinary meaning, and that the exception as to damage by fire, which only appeared in the extended form could, therefore, not apply.

The exception contained in this covenant qualifies the statutory covenants B (4) and B (7). In *Emmett v. Quinn* (1882) 7 A. R. 306, Patterson, J.A., said, p. 324: "But reading them as they stand, we are, in my opinion, not only justified by authority, but required by sound principles of construction, to treat the exception of damage by fire as applying to the covenant to repair as well as to the other to which it is more directly annexed." Burton, J.A., said, pp. 310-311: "Assuming the words 'to repair' to have the extended meaning given in the statute, I think that by the well-understood rule of construction of cognate covenants in the same instrument, the qualification against loss by fire to be found in the covenant to leave the premises in repair must be extended to this covenant also."

These statements of the law were adopted by the Court in *Morris v. Cairncross* (1907) 14 O. L. R. 544 [Div. Ct.], 7 O. W. R. 834; 9 O. W. R. 918; 26 C. L. T. 507; see particularly the judgment of Meredith, C.J., at pp. 555 and 556. See also the judgment of Magee, J., in *Delamatter v. Brown Brothers Co.* (1905) 9 O. L. R. 351, at pp. 361-2, as to the effect of *Emmett v. Quinn* (ante).

A lease under the Act contained a covenant on the part of the lessee to erect a dwelling house on the premises worth \$2,000, to rebuild in case of fire, and to surrender the premises with the appurtenances to the lessor at the determination of the term. The houses having been destroyed by fire were rebuilt by the lessee, and then burnt a second time. It was held that the special covenant was a continuing one and qualified the general covenant to leave the premises in good repair, which in the statutory form excepted reasonable wear and tear and damage by fire, and consequently the lessee was bound to rebuild after the second fire, and could not get rid of such liability by assigning to a pauper after the fire and after notice from the lessor to rebuild: *Emmett v. Quinn*, (*supra*).

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| <p>10. Provided that the lessee may remove his fixtures.</p> | <p>10. Provided, and it is hereby expressly agreed, that the lessee may, at or prior to the expiration of the term hereby granted, take, remove and carry away from the premises hereby demised all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes or other articles upon the said premises in the nature of trade or tenant's fixtures, or other articles belonging to or brought upon the said premises by the said lessee; but the lessee shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto.</p> |
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[Origin: (1910) 10 Edw. VII: c. 54, sched. B 10; R. S. O. 1897, sched. B (9) to which it was first added by (1895) 58 Vict. c. 26, s. 2 (c)].

#### Similar Legislation.

Nova Scotia: sched. E (9).

Clute, J., held that this proviso does not cover buildings, but refers to trade fixtures or other articles upon the premises: Buildings of brick

with stone foundations let into the soil, although erected for sole purposes of trade, cannot be removed by the tenant: *Whitehead v. Bennett* (1858) 27 L. J. (Ch.) 474; *Foley v. Addenbroke* (1843) 13 M. & W. 174; *Stack v. Eaton* (1902) 4 O. L. R. 335, referred to: *Struthers v. Chamandy* (1918) 42 O. L. R. 508; 14 O. W. R. 61 [App. Div.].

In 1886 the landlord leased to the defendant tenant the western store in a business block. The lessor constructed in this store a brick vault, which the tenants lined with steel and then hung a steel door in the doorway. The door hung on pivots, and was held in place, when closed, by bolts which the lock drove into recesses in the masonry prepared to receive them. In 1890 the tenant leased the eastern store in the same block from the same landlord for ten years from the 1st April, 1890. A vault was built in this store and the door removed from the western store and hung in the new vault. On the 10th November, 1899, the tenant took a new lease of the eastern store for five years, from the 1st April, 1900. On the 10th November, 1904, a new lease was taken for eighteen months to be computed from the 1st April, 1905, and purported to surrender the lease of the 10th November, 1899, which it called an "extension of lease." In February, 1906, the defendants removed the door to another building owned by themselves. The lease obtained in 1890 was under the Short Forms Act [as was the one of the 10th November, 1899], and was subject to the proviso that the lessee might remove its fixtures. The lease of 10th November, 1904, had the same proviso. It was held that under the proviso for the removal of fixtures, the tenants might remove all tenants' fixtures and not merely those placed after the leases containing the proviso went into effect: *Cronkhite v. Imperial Bank of Canada* (1907) 14 O. L. R. 270; 27 C. L. T. 272; 9 O. W. R. 326; 8 O. W. R. 18; 26 C. L. T. 582 [Anglin, J.—Div. Ct.].

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| <p>11. Provided that in the event of fire [lightning or tempest] part thereof, shall at any time during the said rent shall cease until the term be burned down, or damaged by fire premises are rebuilt.</p> | <p>11. Provided, and it is hereby expressly agreed, that in case the premises hereby demised, or any [lightning or tempest] so as to render the same unfit for the purposes of the said lessee, then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof, according to the nature and extent of the injuries sustained, shall abate; and all or any remedies for recovery of said rent, or such proportionate part thereof, shall be suspended until the said premises shall have been rebuilt, or made fit for the purposes of the said lessee.</p> |
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[Origin: (1910) 10 Edw. VII c. 54, sched. B 11; R. S. O. 1897, sched. B 10; (1895) 58 Vict. c. 26, s. 2 (c), had not the words in brackets, they were added by 60 Vict. c. 15, sched. A (25).]

#### Similar Legislation.

Nova Scotia: sched. E (10).

Compare the provisions of the Manitoba covenant to pay rent set out at p. 1101 [ante], the covenant to repair at p. 1104 [ante], and to repair on notice, p. 1108 [ante].

The question of abatement and suspension of rent is discussed under Articles 41 and 42.

12. Proviso for re-entry by the said *lessor* agreed, that if [and whenever] the rent hereby on non-payment of rent reserved, or any part thereof, shall be unpaid or non-performance of for fifteen days after any of the days on which covenants.

12. Provided, and it is hereby expressly the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained on the part of the lessee, then and in either of such cases it shall be lawful for the lessor at any time hereafter, into and upon the said demised premises or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as of his former estate; anything hereinafter contained to the contrary notwithstanding.

[Origin: (1910) 10 Edw. VII. c. 54, sched. B 12; R. S. O. 1897, sched. B 11; R. S. O. 1887, c. 106, sched. B 9 (changed to B 11 by 58 Vict. c. 26, s. 2 (c)), had not the words in brackets, added in 1897 by 60 Vict. cap. 15, sched. A (25)].

This proviso must be read with s. 3 (4), p. 1098 [*ante*].

#### *Similar Legislation.*

England: sched. 11.

British Columbia: sched. 14.

Manitoba: sched. 3 (9).

Nova Scotia: sched. E (11).

The implied proviso for re-entry in leases made under the Land Titles Act of Alberta, Manitoba and Saskatchewan are set out at p. 162 [*ante*].

Where all the words found in column one are inserted in a lease purporting to be made in pursuance of the Act, words in amplification not materially altering the sense will not prevent the lease from taking effect under the statute. Thus where the proviso number 9, as it then was, of column one, was inserted as follows: "proviso for re-entry by the said lessor on non-payment of rent whether lawfully demanded or not, or on non-performance of covenants, or seizure or forfeiture of the said term for any of the causes aforesaid," the statutory formula being: "proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants," it was held that the additional words did not exclude the operation of the Act: *Crozier v. Tabb* (1876) 38 U. C. R. 54, and this was followed in *Edwards v. Fairview Lodge* [1920] 3 W. W. R. 867 [B.C.—Murphy, J.].

The extended form of this proviso applies to the breach as well as the non-performance of covenants, that is to acts as well as omissions, and therefore applies to assignment without a license: *Toronto Hospital Trustees v. Denham* (1880) 31 U. C. C. P. 207 [Wilson, C.J.]; *McMahon v. Coyle* (1903) 5 O. L. R. 618; 2 O. W. R. 265; 23 C. L. T. 225 [Boyd, C.] and now contains a provision to this effect, s. 5 [see p. 717, *ante*].

A right of re-entry for breach of covenant cannot be exercised where the breach took place before the assignment: *Cohen v. Tanner* [1900] 2 Q. B. 609; *Brown v. Gallagher & Co. Ltd.* (1914) 31 O. L. R. 323 (Middleton, J.). In England the law was changed in 1911, when section 10 of the Conveyancing Act of 1881 was made to apply to the right to re-enter where the assignment of the reversion is made after the breach.

This case followed *Doe d. Spencer v. Godwin* (1815) 4 M. & S. 265. where the proviso was for breach of covenants *thereinafter contained*, and all the covenants preceded the proviso. It was held the Court could not reject the word *thereinafter* which restrained the proviso.

See also *Doe d. Wyndham v. Carew* (1841) 2 Q. B. 317; 11 L. J. (Q.B.) 5, and the other cases noted at p. 718, *ante*.

The owners in fee of certain lands, on the 30th of October, 1866, leased it for 21 years to one B., by a lease under the R. S. O. c. 106, containing covenants to pay rent and not to assign or sublet without leave. By a deed of the same date, after reciting the lease and an agreement of B. to purchase buildings on the land for \$1,400, the lessors conveyed the said buildings to B., his executors, administrators and assigns. B. then mortgaged the premises to H. and afterwards assigned his interest to C., who assigned to G. H., and G. H. assigned to M. This last assignment was objected to by the lessors, who brought ejectment against D. (who was in possession of the buildings under a verbal lease from B.), for the forfeiture occasioned by such assignment, as also for non-payment of rent. While proceedings to set aside the verdict were pending, the lessors obtained a decree in Chancery by which the conveyance to B., so far as it conveyed the land on which said buildings stood, was declared to be a mistake and was rectified so as to pass only a chattel interest in said buildings and no estate in the land. It was held that the lessors were entitled to recover for breach of the covenant not to assign; that the extended form of the proviso for re-entry under the statute applies to the breach as well as the non-performance of covenants, that is to acts as well as omissions, but that under the circumstances the recovery must be limited to the land alone, and the lessors could not enter on the buildings or remove D. therefrom: *Toronto Hospital v. Denham* (*supra*).

|  |  |
|--|--|
| <p>13. The said <i>lessor</i> covenants with the said <i>lessee</i> for quiet enjoyment.</p> | <p>13. And the lessor doth hereby covenant with the lessee, that he paying the rent hereby reserved, and performing the covenants hereinbefore on his part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from or under him.</p> |
|--|--|

[Origin: (1910) 10 Edw. VII c. 54, B 13; R. S. O. 1897, B 12, which was in the same terms as the present Manitoba clause; as was R. S. O. 1887, sched. B 10, changed to B 12 by (1895) 58 Vict. c. 26, s. 2 (c).]

#### *Similar Legislation.*

England: sched. 12.

British Columbia: sched. 15.

Manitoba: sched. 3 (10), reads: And the lessor doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they, paying the rent hereby reserved and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

Nova Scotia: sched. E (12).

The lease in *Irving v. The Grimsby Park Co., Ltd.* (1908) 16 O. L. R. 386; 11 O. W. R. 748 [C.A.], was a Short Forms Lease, and it was held that in the circumstances of the case an attempt to charge an admission fee to enter the only gate of the restricted property—part of which the defendant had leased to the plaintiff and where he lived—even although empowered by statute to charge such fee, must fail.

This covenant is confined to the acts of the lessor, and those lawfully claiming under him [see also pp. 153 and 537, *ante*]. When the lessee under such a lease is evicted by title paramount to the lessor, he cannot recover under the covenant, nor on the implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment: *Davis v. Pitchers* (1874) 24 U. C. C. P. 516; see also *Line v. Stephenson* (1838) 5 Bing. N. C. 183-6; *Merrill v. Frame* (1812) 4 Tannt. 329; and where the lessee was ejected by the assignee of a mortgagee, whose mortgage was prior to the lease, and not made by the lessor, it was held that he could not recover on the covenant, as the assignee of the mortgage was not a person "claiming by, from or under" the lessor; but under his predecessor in title: *Bellamy v. Barnes* (1882) 44 U. C. R. 315.

It has already appeared [p. 285, *ante*], that the covenant for quiet enjoyment is independent of the covenant for payment of rent, and even where the former covenant is in the statutory form [p. 1101, *ante*], "he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained," these words do not seem to make the payment of rent a condition precedent to the right to quietly enjoy: *Edge v. Boileau* (1885) 16 Q. B. D. 117; *Dawson v. Dyer* (1833) 5 B. & Ad. 584; *Hays v. Bickerstaff* (1669) 2 Mod. 35; *Ludwell v. Newman* (1795) 6 T. R. 458.

#### *Covenants in Other Acts but not in the Ontario Act.*

A—And to paint outside every year.

English as No. 4, and in the B. C. Act as No. 6.

"And also that the said [lessee] his executors, administrators, assigns will in every year in the said term, paint all the outside wood-work and iron-work belonging to the said premises with two coats of proper oil colours, in a workmanlike manner."

B—And to paint and paper inside every year.

English Act as No. 5, B. C. Act as No. 7:

"And also (as in 4) will in every year, paint the inside wood, iron and other works, now or usually painted with two coats of proper oil-colours in a workmanlike manner; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour part of the said premises as are now plastered."

C—That the said lessee will not use the premises as a shop.

This covenant appears in the English Act as No. 8; and in the British Columbia Act as No. 10.

"And also (as in 4) will not convert, use or occupy the said premises, or any part thereof, into or as a shop, warehouse or other place, for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling house, without the consent in writing of the said [lessor]."



D—And to insure from fire in the joint names of the lessor and the lessee, to shew receipts and to rebuild in case of fire.

English Act as No. 6, B. C. Act as No. 8.

E—Will cultivate.

Alberta Act, L (3).

Saskatchewan Act, O (4).

“That I, the said lessee, will at all times during the said term cultivate, use and manage in a proper husbandlike manner all such parts of the land as are now or shall hereafter, with the consent in writing of the said lessor, be broken up or converted into tillage and will not impoverish or waste the same.”

Reference should be made to the following cases:—

*Fetherstone v. Bice* [1917] 1 W. W. R. 224 [Alta.—Walsh, J.], noted at p. 718, *ante*.

*Warner v. Linahan* [1919] 2 W. W. R. 94 [Alta.—App. Div.], noted at p. 765, *ante*.

F—Will not carry on offensive trade.

Alberta Act, L (5).

Saskatchewan Act, O 6.

“That I, the said lessee, will not at any time during the said term use, exercise or carry on or permit or suffer to be used, exercised or carried on in, or upon the said premises or any part thereof any noxious, noisome or offensive art, trade, business, occupation or calling, and no act, matter or thing whatsoever shall at any time during the said term be done in or upon the said premises or any part thereof which shall or may be or grow to annoyance, nuisance, grievance, damage or any disturbance of the occupiers or owners of the adjoining lands and properties.”

And see *Brown v. Toothills* (1914) 7 W. W. R. 318 [Man.—Metcalf, J.].

G—And will fence.

Alberta: L (2).

Saskatchewan: O. (3).

“That I, the said lessee, will during the continuance of the said term erect and put upon the boundaries of the said land, or on those boundaries on which no substantial fence now exists, a good and substantial fence.”

## APPENDIX B.

The following cases in which "crop" leases have been considered are of importance only in respect of the facts.

- Richey v. Rear* (1907) 5 W. L. R. 420 [Man.—C.A.].  
*Lamb v. Thompson* (1913) 24 W. L. R. 404 [Man.].  
*Tocher v. Thompson* (1914) 27 W. L. R. 140; 28 W. L. R. 634 [Man.].  
*Lott v. Given* (1911) 19 W. L. R. 713; 1 W. W. R. 388 [Sask.].  
*Sattler v. Wilson* (1913) 24 W. L. R. 150 [Sask.].  
*Dornian v. Crapper* (1914) 27 W. L. R. 599; 6 W. W. R. 551 [Sask.].  
*Cotton v. Boyd* (1915) 31 W. L. R. 797 [Sask.].  
*Malfaire v. Schultz* (1911) 18 W. L. R. 407 [Sask.].  
*Sutton v. Hinch* (1910) 12 W. L. R. 500; 30 C. L. T. 561 [Man.].  
*Foster v. Moss* (1911) 17 W. L. R. 174 [Sask.].  
*Alexander v. Watson* (1909) 10 W. L. R. 441; 29 C. L. T. 868 [Man.].  
*Findlay v. Falconer* (1911) 17 W. L. R. 167; 11 W. L. R. 520; 29 C. L. T. 1177 [Sask.].  
*Reg. v. Tessier* (1902) 5 Can. Cr. Ca. 73.  
*McKillop v. Royal Bank* [1918] 2 W. W. R. 100.

## APPENDIX C.

### ADDENDA.

*Seed grain liens*—No seed grain to be supplied to tenant without consent of owner: (1921), c. 65, s. 14 [Man].

P. 9, Chap. I., Art. 2—*Lease or license*—License to keep cars in a garage: *Stephen v. Holland* (1922) 21 O. W. N. 306 [Rose, J.].

See also *Arbuthnot v. Toronto R. W. Co.* (1922) 21 O. W. N. 393 [App. Div.].

P. 11., Chap. I., Art. 2—*Contract to farm land on crop payment plan*—Relation of landlord and tenant created—Crop Payment Act [Sask.], s. 2: *Campbell v. McKinnon*, 14 M. R. 421, referred to; *McLean v. Denning and Sask. Co-operative Elevator Co. Ltd.* [1922] 1 W. W. R. 401 [Sask.—C.A.].

P. 23, Chap. I., Art. 3—*Agreement for lease*—Homestead—Wife's refusal to consent—No specific performance—Damages: *Scott and Shepard v. Miller* [1921] 3 W. W. R. 163, 61 D. L. R. 377 [Sask.—McKay, J.].

P. 23, Chap. I., Art. 3—*Noxious Weeds Act*—(1921) 11 Geo. V. c. 44, s. 18 Man., renting weed infested land.

P. 25, Chap. I., Art. 3—*Agent*—Lease executed under power of attorney—Insanity of grantor as revocation: *Kerr v. Town of Petrolia* (1921) 21 O. W. N. 31 [Mulock, C.J.Ex.].

P. 29, Chap. I., Art. 3—*Municipal corporation*—Lease by—Execution—Powers—By-law—Validity: *Kerr v. Town of Petrolia* (1921) 21 O. W. N. 31 [Mulock, C.J.Ex.].

P. 40, Chap. I., Art. 3—*Purchaser under agreement for sale*—Right to lease: *Smith v. Beitz* [1921] 1 W. W. R. 278 [Sask.—C.A.]. Occupation rent when terminated: *Korman v. Abramson* (1921) 49 O. L. R. 9 [Rose, J.].

P. 51, Chap. I., Art. 3—*Insanitiy*—Mental incapacity of lessor at time of execution of lease—Lease executed by power of attorney—Revocation: *Kerr v. Town of Petrolia* (1921) 21 O. W. N. 31 [Mulock, C.J.Ex.].

P. 75, Chap. I., Art. 3—*Sham lease*: *Stewart v. Bank of Ottawa* (1897) 3 Terr. L. R. 447 [Wetmore, J.].

P. 76, Chap. I., Art. 3—*Reformation of lease*—Unilateral mistake—Fraud: *Bourgeois v. Smith* (1921) 48 N. B. R. 212, 53 D. L. R. 515 [N.B.—Grimmer, J.].

P. 78, Chap. I., Art. 4—*Estoppel*—Tenant not permitted to deny landlord's title: *McLean v. Embree* (1921) 54 N. S. R. 318, 57 L. L. R. 723 [App. Div.].

P. 103, Chap. II., Art. 10—*Agreement for lease*—Lease of hotel with option to rent railway refreshment room in preference to any other party—Lessor not bound to rent if desirous of operating dining-room: *County Hotel & Wine Co. Ltd. v. L. & N. W. Ry.* [1921] 1 A. C. 85, 89 L. J. K. B. 916. This case is discussed in 37 L. Q. Review at pp. 126 and 127.

P. 103, Chap. II., Art. 10—*Agreement for lease*—Extension of term—Offer and acceptance: *Re Cowan and Boyd* (1921) 49 O. L. R. 335, 19 O. W. N. 578, 61 D. L. R. 497 [App. Div.].

P. 103, Chap. II., Art. 10—*Agreement for lease*—Oral agreement to extend term for 1 year—Statute of Frauds—R. S. O. 1914 c. 102, s. 4, different from English Act: *Re Lingon v. Wolfish* (1921) 20 O. W. N. 416 [Ont.—App. Div.].

P. 103, Chap. II., l. 24, Art. 10—*Agreement for a lease*—By R. S. O. 1914 c. 102, s. (4), set out at p. 95 (*ante*), certain agreements for leases would not be in writing.

P. 103, Chap. II., Art. 10—*Agreement for lease*—*Agreement to cancel*—Evidence: *Goon King et al. v. Lahey* (1921) 54 N. S. R. 288 [App. Div.].

P. 107, Chap. II., Art. 11—*Agreement for lease*—*Parol*—No possession—Statute of Frauds—Amendment to plead—No specific performance: *Pachal v. Ludwig et al.* [1921] 3 W. W. R. 551, 14 Sask. L. R. 540 [C.A.].

P. 112, Chap. II., Art. 11—*Agreement for lease*—Statute of Frauds—Formal lease to be prepared—Agency—Lack of agreement: *Crawford & Walsh v. C. W. Lindsay Co. Ltd.* (1921) 20 O. W. N. 263 [App. Div.].

P. 125, Chap. III., Art. 13—*Agreement for lease*—Description of premises—Error in house number—Parcel or no parcel—Specific performance: *Forgeone v. Lewis* [1920] 2 Ch. 326, 89 L. J. Ch. 510. This case is discussed in 37 L. Q. Review, at pp. 8 and 9.

P. 125, Chap. III., Art. 13—*Agreement for lease*—Description of premises—Specific performance: *Scott & Sheppard v. Miller* [1921] 3 W. W. R. 163, 61 D. L. R. 377 [Sask.—McKay, J.].

P. 131, Chap. III., Art. 14—*Property demised*—Parcel—Lease of for premises—Vestibule not included: *Dairs v. Fraser & Shaw* [1921] 28 B. C. R. 12, 61 D. L. R. 48 [B.C.—Cayley, Co.J.].

P. 153, Chap. III., Art. 15—*Quiet enjoyment*—Lease made under Saskatchewan Land Titles Act—Implied covenant—Scope of covenant—Lessee who has filled caveat permitting lessor to place mortgage—No waiver of covenant: *Eagles Hall Association of Swift Current Ltd. v. Bertin* [1922] 1 W. W. R. 375 [Sask.—C.A.].

P. 153, Chap. III., Art. 15—*Quiet enjoyment*—Covenant implied from use of word "rent"—Lessor stipulating to be allowed to erect an addition—Qualification damage to tenant in carrying out work: *Dougherty v. Armaly* (1921) 19 O. W. N. 573, 49 O. L. R. 34, 58 D. L. R. 380 [Ont.—App. Div.].

P. 156, Chap. III., l. 11, Art. 15—*Furnished lodgings*—No implied warranty—Warranty as to fitness of tenant—Infectious disease: *Humphreys v. Miller* [1917] 2 K. B. 122, 37 C. L. T. 657.

P. 173, Chap. III., Art. 19—*Agreement for lease*—Definite date for delivery of possession—Strike—Failure to complete building—Breach: *Clark v. Northern Investment Co.* (1921) 59 D. L. R. 623 [Alta.—C.A.].

P. 176, Chap. III., Art. 19—*Agreement for lease*: *Rotman v. Pennett*, affirmed (1921) 40 O. L. R. 114, 19 O. W. N. 455 [App. Div.].

P. 180, Chap. III., Art. 20—*Subletting*: *McGlade v. Pashnitzky* (1921) 19 O. W. N. 472 [Lennox, J.].

P. 190, Chap. IV., Art. 23—*Yearly tenancy or term certain*: *Re Fice and Department of Public Works* (1921) 20 O. W. N. 322 [App. Div.].

P. 213, Chap. V., Art. 28—*Mortgagee going into possession and receiving rent from tenant until expiry of lease*—New agreement made by mortgagee before expiry of lease—Validity—Binding on owner regaining possession: *Gregory v Goodwin* [1921] 60 D. L. R. 448 [Sask.—C.A.].

P. 256, Chap. VI., Art. 33—*Rent*—Proportion of tenant's gross monthly income—"Joint adventure": *Tranishi v. C. P. R.* [1918] 2 W. W. R. 1034 [B.C.—C.A.].

P. 257, Chap. VI., Art. 33—*Crop-rent lease*—Thresher's lien on lessor's share of crop—Crop Payment Act [Sask.] s. 2: *In re Smith, Ex parte Van-eise* [1922] 1 W. W. R. 283 [Sask.—Macdonald, J.].

P. 264, Chap. VI., Art. 33—*Rent*—Crop leases—See the Rural Credits Act (Sask.) 1921 c. 62, s. 2 (2).

P. 285, Chap. VI., Art. 41—*Rent*—Agreement to reduce: *Western Transfer Co. v. Fry* (1920) 55 D. L. R. 291 [Alta.—App. Div.].

P. 297, Chap. VI., Art. 41—*Eviction*—Abandonment: *Smith v. Beitz* [1921] 1 W. W. R. 278 [Sask.—C.A.]. Effect of: *Dairs v. Fraser & Shaw* (1920) 28 B. C. R. 12, 61 D. L. R. 48 [Cayley, Co.J.].

P. 312, Chap. VI., Art. 42—*Covenant to pay rent without deduction*—Exceptions—"Tithe rent charge"—"Tithe rate" not included: *In re Salter and Awdry's Lease* (1921) 90 L. J. Ch. 459 [Eve, J.].

P. 315, Chap. VI., Art. 42—*Rent*—Deduction of amount spent by tenant for repairs: See (1901) 21 C. L. T. 204.

P. 334, Chap. VII., Art. 45—*Action for rent*—Effect of judgment for earlier rent—Subsequent eviction or termination—New trial: *Green v. Smith* (1922) 21 O. W. N. 253 [App. Div.].

P. 372, Chap. VIII., Art. 49—*Distress Act Amendment Act* (1921) c. 14, s. 1 [Man.], limiting right of mortgagees and vendors to distrain where relation of landlord and tenant created: *Confederation Life Association v. Wood* [1922] 1 W. W. R. 766 [Alta.—Clarry, M.C.].

P. 375, Chap. VIII., Art. 51—*Distress*—Attornment clause in mortgage—Death of mortgagor—Crop put in by widow—Widow a trespasser—No distress: *Rex v. Tschetter* [1918] 1 W. W. R. 934, 11 Sask. L. R. 116, 29 Can. Cr. Ca. 179, 39 D. L. R. 688 [C.A.].

P. 378, Chap. VIII., Art. 51—*Distress*—Rent not a fair rental: *McCloy v. Cox* [1921] 2 W. W. R. 790 [Man.—Mathers, C.J.K.B.].

P. 379, Chap. VIII., Art. 52—*Distress*—When rent in arrears: *Honens v. International Harvester Co.* [1921] 1 W. W. R. 820, 60 D. L. R. 631 [Alta.—Simmons, J.].

P. 400, Chap. VIII., Art. 60—*Assignment for benefit of creditors*—Preferential lien for rent—(1919) 9 Geo. V. c. 79, s. 52 [Sask.], omitted on revision. See Appendix D. and *Kerr v. Capital Grocery Ltd.* [1921] 1 W. W. R. 1221, 59 D. L. R. 388, 1 C. B. R. 490 [Sask.—McKay, J.].

P. 400, Chap. VIII., Art. 60—*Right of landlord to rank upon assigned property for future rent*: *Gardner v. Newton* (1916) 26 M. R. 251 [Mathers, C.J.K.B.].

P. 406, Chap. VIII., Art. 60—(1917) 7 Geo. V. c. 34, s. 19 (3) [Sask.] repealed: See *Kerr v. Capital Grocery Ltd.* [*supra*].

P. 406, Chap. VIII., Art. 60—*Assignment for benefit of creditors*—Right of assignee to retain possession—(1919) 9 Geo. V. c. 79, ss. 53 and 54 [Sask.] omitted from R. S. S. (1920) c. 160 on revision—See Appendix D. and *Kerr v. Capital Grocery, Ltd.* [*supra*].

P. 438, Chap. IX., Art. 67—*Distress*—Made after possession by tenant has ceased—Illegal—R. S. N. S. (1900) c. 172, s. 13: *Adams v. Suprenant* (1921) 54 N. S. R. 364, 61 D. L. R. 540 [App. Div.].

P. 441, Chap. IX., Art. 68—*Liability of landlord* when his bailiff seizes goods of stranger under distress—Warrant for rent: *Mack v. Brass* (1921) 21 O. W. N. 125 [App. Div.].

P. 450, Chap. IX., Art. 71—*Distress*—Motor-car: See 55 C. L. J. 180.

P. 450, Chap. IX., Art. 71—*Distress*—Goods covered by chattel mortgage—Exercise of landlord's remedy by chattel mortgagee—Trustee: *Disher*

v. *Levitt* (1921) 19 O. W. N. 487 [App. Div.]; 18 O. W. N. 433 [Sutherland, J.].

P. 450, Chap. IX., Art. 71—*Distress—Exemptions*—The Manitoba Distress Act, R. S. M. 1913 c. 55 was amended in 1922 by adding:—

5A. "The following chattels shall be exempt from seizure under any distress levied under this Act, namely—

(a) the beds, bedding and bedsteads (including perambulators or cradles) in ordinary use by the debtor and his family;

(b) the necessary and ordinary wearing apparel of the debtor and his family, including one change of underclothing and warm outdoor clothing;

(c) one cooking stove with pipes and furnishings, one other heating stove with pipes, two towels, one washbasin, one kitchen table, one tea kettle, one teapot, one saucepan, one frying pan and for each member of the family the following, namely: one chair, one cup and saucer, one plate, one knife, one fork and one spoon;

(d) all necessary fuel, meat, fish, flour and vegetables for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value \$50.00;

(e) the tools, agricultural implements and necessities used by the debtor in the practice of his trade, profession or occupation, to the value of \$100.00;

(f) twelve volumes of books, the books of a professional man, one axe, one saw.

2. This Act shall come into force on the day it is assented to.

P. 482, Chap. IX., Art. 67—*Distress—Fraudulent removal to avoid distress*—R. S. S. (1920) c. 160, s. 29: *Ziulkowski v. Rabuka* (1921) 59 D. L. R. 682 [Sask.—Bigelow, J.].

P. 508, Chap. IX., Art. 80—*Distress—Failure to appraise—Actual damage must be shewn*: *McCloy v. Cox* [1921] 2 W. W. R. 790 [Man.—Mathers, C.J.K.B.].

P. 514, Chap. IX., Art. 83—*Execution creditors*—The Statute 8 Anne c. 14, s. 1: *Honens v. International Harvester Co.* [1921] 1 W. W. R. 820, 60 D. L. R. 631 [Alta.—Simmons, J.].

P. 514, Chap. IX., Art. 83—*Distress—Illegal and excessive—Goods in custodia legis*—Execution out of County Court—Acceleration of rent—Provision for forfeiture upon goods being taken in execution: *McCloy v. Cox* [1921] 2 W. W. R. 790 [Man.—Mathers, C.J.K.B.].

P. 537, Chap. X., Art. 85—*Quiet enjoyment*—Interference by stranger with lessee's possession—Scope of covenant: *Boyle v. Rusconi* [1921] 1 W. W. R. 354 [Sask.—MacDonald, J.].

P. 544, Chap. X., Art. 85—*Derogation from grant*—Landlord's user of adjoining premises: *Harmer v. Jumbie (Nigeria) Tin Areas Ltd* (1921) 90 L. J. Ch. 140 [C.A.].

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P. 579, Chap. XI., Art. 95—*Repair*—Land near tracks leased from railway company—Elevator built on land damaged by locomotive jumping tracks: *Reliance Grain Co. v. C. N. R. Co.* (1921) 59 D. L. R. 634 [Man.—Galt, J.].

P. 581, Chap. XI., Art. 96—*Repair*—Damage caused by escape of steam from pipe on premises—Pipe disconnected before tenant took possession: *Iannone v. Grassby* [1921] 2 W. W. R. 676 [Man.—Macdonald, J.].

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P. 852, Chap. XIV., Art. 128—*Fixtures*—Wrongful removal by tenant—Subsequent transfer of freehold to a purchaser—Purchaser's right to sue for damages for removal: *Stephen v. Holland* (1922) 21 O. W. N. 306 [Rose, J.].

*Fixtures*—Removal by tenant—Damages: *Hellwig v. Nicholson*. (1921) 59 D. L. R. 621 [Alta.—App. Div.].

*Fixtures*—Injunction restraining removal: *McLeese v. Jones & McKenzie* (1921) 20 O. W. N. 407 [Sutherland, J.].

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P. 955, Chap. XV., Art. 135—*Renewal* or purchase of "plant and rights of lessee"—Oil lease—Valuation: *Re Chesser and Ruckee* (1921) 20 O. W. N. 75 [Middleton, J.].

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P. 965, Chap. XV., Art. 135—*Renewal*—Right to perpetual renewal—Tenancy from year to year—Repugnancy—Rejection: *Gray v. Spyer* [1921] 2 Ch. 549 [Younger, L.J. for Astbury, J.].

P. 972, Chap. XV., Art. 135—*Arbitration to fix ground rent*—Award—Action for use and occupation: *MacDonell v. Davies* (1915) 8 O. W. N. 315 [Div. Ct.].

P. 974, Chap. XV., Art. 135—*Renewal on payment for tenant's buildings*—Appointment of arbitrator upon landlord's refusal: *Re Richardson and Gurney Foundry Co. Ltd.* (1921) 20 O. W. N. 42 [App. Div.].

P. 992, Chap. XV., Art. 135—*Option to purchase*: *Contractors' Supply Co. v. Gow* (1921) 10 O. W. N. 437 [Kelly, J.].

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See also sec. 19 of the Act of 1921 and the annotations in 59 D. L. R., p. 12 and 1 C. B. R. p. 568.

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P. 1015, Chap. XVI., Art. 136—*Assignment by trustee in bankruptcy* even where covenant against—11-12 Geo. V. c. 17 (1921) s. 19—Annotation 59 D. L. R., pp. 12 and 23 et seq.

P. 1019, Chap. XVI., Art. 137—*Purchase of land*—Existing lease: See *Royal Trust Co. v. Fairbrother* [1921] 60 D. L. R. 538 [Alta.—Scott, J.]; *McKay v. Biaby* [1921] 60 D. L. R. 541 [Alta.—Simmons, J.]; *Matejka v. King* [1921] 61 D. L. R. 426 [Alta.—Scott, J.].

P. 1027, Chap. XVI., Art. 137—*Registration of lease*: *In re the Land Titles Act* [1921] 2 W. W. R. 841 [Sask.—M. I.].

P. 1061, Chap. XVI., Art. 139—*Covenant against assigning without Leave*—Winding-up—Liquidator bound: *In re Farrow's Bank Ltd.* (1921) 90 L. J. (Ch.) 465 [C.A.].

P. 1063, Chap. XVI., Art. 140—*Covenant against assigning without leave*—Leave unreasonably withheld: *In re Winfrey and Chatterton's Agreement*; *Chatterton v. Evison* (1921) 90 L. J. Ch. 417 [Sargant, J.]; *Ideal Film Renting Co. v. Nielson* (1921) 90 L. J. (Ch.) 429 [Eve, J.].

P. 1063, Chap. XVI., Art. 140—*Assignment*—Agreement for—Assignor's duty to obtain lessor's assent if required: *Maas v. McMahon* [1921] 3 W. W. R. 378 [Alta.—App. Div.].

## APPENDIX D.

Table shewing effect of the 1920 Revision on the Landlord and Tenant Act (Saskatchewan), 1919.

Taken from R. S. S. 1920, Vol. IV., Sch. II., pp. 3056-7.

| 1918-19.               | R. S. S. 1920.          |
|------------------------|-------------------------|
| Chapter 79, section 1  | Chapter 160, section 1  |
| Chapter 79, section 2  | Chapter 160, section 2  |
| Chapter 79, section 3  | Chapter 160, section 3  |
| Chapter 79, section 4  | Chapter 160, section 4  |
| Chapter 79, section 5  | Chapter 160, section 5  |
| Chapter 79, section 6  | Chapter 160, section 6  |
| Chapter 79, section 7  | Chapter 160, section 7  |
| Chapter 79, section 8  | Chapter 160, section 8  |
| Chapter 79, section 9  | Chapter 160, section 9  |
| Chapter 79, section 10 | Chapter 160, section 10 |
| Chapter 79, section 11 | Chapter 160, section 11 |
| Chapter 79, section 12 | Chapter 160, section 12 |
| Chapter 79, section 13 | Chapter 160, section 13 |
| Chapter 79, section 14 | Chapter 160, section 14 |
| Chapter 79, section 15 | Chapter 160, section 15 |
| Chapter 79, section 16 | Chapter 160, section 16 |
| Chapter 79, section 17 | Chapter 160, section 17 |
| Chapter 79, section 18 | Chapter 160, section 18 |
| Chapter 79, section 19 | Chapter 160, section 19 |
| Chapter 79, section 20 | Chapter 160, section 20 |
| Chapter 79, section 21 | Chapter 160, section 21 |
| Chapter 79, section 22 | Chapter 160, section 22 |
| Chapter 79, section 23 | Chapter 160, section 23 |
| Chapter 79, section 24 | Chapter 160, section 24 |
| Chapter 79, section 25 | Chapter 160, section 25 |
| Chapter 79, section 26 | Chapter 160, section 26 |
| Chapter 79, section 27 | Chapter 160, section 27 |
| Chapter 79, section 28 | Chapter 160, section 28 |
| Chapter 79, section 29 | Chapter 160, section 29 |
| Chapter 79, section 30 | Chapter 160, section 30 |
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| Chapter 79, section 44 | Chapter 160, section 44 |
| Chapter 79, section 45 | Chapter 160, section 45 |
| Chapter 79, section 46 | Chapter 160, section 46 |
| Chapter 79, section 47 | Chapter 160, section 47 |
| Chapter 79, section 48 | Chapter 160, section 48 |
| Chapter 79, section 49 | Chapter 160, section 49 |
| Chapter 79, section 50 | Chapter 160, section 50 |
| Chapter 79, section 51 | Chapter 160, section 51 |
| Chapter 79, section 52 | Omitted.                |
| Chapter 79, section 53 | Omitted.                |
| Chapter 79, section 54 | Omitted.                |
| Chapter 79, section 55 | Chapter 160, section 52 |
| Chapter 79, section 56 | Chapter 160, section 53 |
| Chapter 79, section 57 | Omitted.                |
| Chapter 79, section 58 | Not consolidated.       |
| Schedule.              | Schedule.               |
| Form A.                | Form A.                 |
| Form B.                | Form B.                 |



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